SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee

v.

SAMUEL ROTH, Appellant

STATEMENT PURSUANT TO RULE 15(b)

This proceeding was instituted by the filing of a twenty-six count indictment on July 20, 1955. The defendant-appellant pleaded not guilty on July 25, 1955. Trial by jury commenced on January 3, 1956 before the Honorable John M. Cashin, and was concluded on January 12, 1956. Counts 12, 25 and 26 were dismissed during trial. The jury found the defendant-appellant guilty of Counts 10, 13, 17 and 24 and acquitted him of the remaining counts. The judgment of the Court, sentencing the defendant-appellant to concurrent five year terms of imprisonment on each of the four counts, and a fine of $5,000 on Count 10, and fines of $1 each on Counts 13, 17 and 24 which last fines were remitted, was entered on February 7, 1956. Notice of appeal was filed on February 7, 1956.

[fol. 2] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JUDGMENT AND COMMITMENT—February 7, 1956

On this 7th day of February, 1956 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a Jury of the offense of unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters, to wit, printed circulars, letters, advertisements, writings, pictures and notices and a book

entitled "American Aphrodite" which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character

T 18 Sec. 2 and 1461 USC as charged in counts 10-13-17-24 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count Ten—Five Years and fined $5000. Defendant to stand committed until fine is paid or he is otherwise discharged according to law.

[fol. 3] Count Thirteen—Five Years and fined $1.00. Fine Remitted.

Count Seventeen—Five Years and fined $1.00. Fine Remitted.

Count Twenty-four—Five Years and fined $1.00. Fine Remitted.

Prison sentence on each of counts 10-13-17-24 to run concurrently with each other.

Motion for Bail pending Appeal is denied.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(S.) John M. Cashin, United States District Judge.

[fol. 4] In United States District Court, Southern District of New York

Indictment—Filed July 20, 1955

The Grand Jury charges:

1. On or about the 15th day of February, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited

and caused to be deposited for mailing and delivery certain matters, to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

James Feldhouse
6171 Stanbury
Parma 29, Ohio

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom, and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including, among other articles and things:

Wallet Nudes
French Nudes at Play
Stereoptic Nude Show
2 Undraped Stars.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 5] Count II

The Grand Jury further charges:

1. On or about the 18th day of February, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars; letters, advertisements, writings, pictures and notices addressed to:

Bill B. Klovkski
4498 W. Point
Dearborn, Michigan

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Wallet Nudes
French Nudes at Play
Stereoptic Nude Show
2 Undraped Stars.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 6] Count III

The Grand Jury further charges:

1. On or about the 16th day of March, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Brooks Dyer
3821 Regal Place
St. Louis 9, Mo.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Wallet Nudes
French Nudes at Play
Stereoptic Nude Show
2 Undraped Stars.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 7] Count IV

The Grand Jury further charges:

1. On or about the 16th day of February, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Mr. R. L. Bissler
118 S. Haines
Alliance, Ohio

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Wallet Nudes
French Nudes at Play
Stereoptic Nude Show
2 Undraped Stars.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 8] Count V

The Grand Jury further charges:

1. On or about the 25th day of May, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Brooks Dyer
3821 Regal Place
St. Louis 9, Mo.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Good Times,
Chicago Sex-Dimensional Issue.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 9] Count VI

The Grand Jury further charges:

1. On or about the 26th day of May, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Ehlich Children's Home
3737 N. Mozart
Chicago, Ill.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Good Times,
Chicago Sex-Dimensional Issue.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 10] Count VII

The Grand Jury further charges:

1. On or about the 28th day of June, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Charles Buerger
5424 Northumberland St.
Pittsburgh 17, Pa.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Good Times,
Chicago Sex-Dimensional Issue
NUS.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 11] Count VIII

The Grand Jury further charges:

1. On or about the 28th day of April, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Mr. Richard G. Kahn
33 N. LaSalle
Chicago, Ill.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Good Times.
Chicago Sex-Dimensional Issue.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 12] Count IX

The Grand Jury further charges:

1. On or about the 24th day of May, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures, and notices addressed to:

North West Registry for Nurses
3903 N. Kildar St.
Chicago, Ill.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Good Times,
Chicago Sex Dimensional Issue;

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 13] Count X

The Grand Jury further charges:

1. On or about the 10th day of December, 1954, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Mr. Paul Masadowski
76-39 171 St.
Flushing 66, N. Y.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Photo and Body
Good Times, Vol. 1 No. 10.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 14] Count XI

The Grand Jury further charges:

1. On or about the 3rd day of January, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Duane Elliott
17 Pratt Ave.
Mt. Vernon, N. Y.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Photo and Body
Good Times, Vol. 1 No. 10.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 15] Count XII

The Grand Jury further charges:

1. On or about the 24th day of December, 1954, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Gloria Jëan Paulo
Fairground Blvd. R.D. 2
Canfield, Ohio

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Photo and Body
Good Times, Vol. 1 No. 10.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 16] Count XIII

The Grand Jury further charges:

1. On or about the 9th day of November, 1954, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Robert Mateinore
21 Edgewater Dr.
Old Greenwich, Conn.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

Good Times, Vol. 1 No. 8.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 17] Count XIV

The Grand Jury further charges:

1. On or about the 18th day of April, 1955, at the Southern District of New York, Samuel Roth, the defendant, herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Mr. J. Chapman
17 Hilltop Place
Staten Island 8, New York

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

NUS
Good Times, Vol. 2 No. 14.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 18] Count XV

The Grand Jury further charges:

1. On or about the 15th day of April, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Mrs. E. W. McCreery
1569 Golf View Road
Ardmore, Penna.

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

NUS
Good Times, Vol. 2, No. 14.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 19] Count XVI

The Grand Jury further charges:

1. On or about the 20th day of July, 1953, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Mrs. Geo. K. Livermore
30 E. 72nd Street
New York 21, New York

which matters were nonmailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and in that they gave information directly and indirectly where, how, from whom and by what means other matters, articles and things of an obscene, lewd, lascivious, filthy and indecent character might be obtained, including among other articles and things:

American Aphrodite, Number 3.

2. The aforesaid nonmailable matters, articles and things are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 20] Count XVII

The Grand Jury further charges:

1. On or about the 19th day of February, 1954, at the Southern District of New York, Samuel Roth, the defend-

ant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters, to wit, printed circulars, letters, advertisements, writings, pictures and notices addressed to:

Archie Lovejoy
RR 5
Cordele, Georgia

which matters were non-mailable in that they were obscene, lewd, lascivious, filthy and of an indecent character, and which matters are further described as having advertised, among other things, "American Aphrodite Number Thirteen" and "Good Times, Vol. 1 No. 5".

2. The aforesaid non-mailable matters are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

Count XVIII

The Grand Jury further charges:

1. On or about the 21st day of March, 1955 at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain [fol. 21] matters, to wit, "Stereoptice Nude Show" and "Wallet Nudes", addressed to:

Bernard Skriloff
1055 University Ave.
Bronx 52, N. Y.

which matters were non-mailable in that they were obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matters are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

Count XIX

The Grand Jury further charges:

1. On or about the 18th day of March, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matter, to wit, a book of Photographs, entitled "NUS", addressed to:

Bernard Skriloff
1055 University Ave.
Bronx 52, N. Y.

which matter was non-mailable in that it was obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matter is of such vile, obscene, lewd and lascivious character that a further de- [fol. 22] scription thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

Count XX

The Grand Jury further charges:

1. On or about the 14th day of April, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters, to wit, eight magazines entitled "Good Times", described further as Vol. 1 No. 7, Vol. 1 No. 8, Vol. 1 No. 9, Vol. 1, No. 10, Vol. 1, No. 11, Vol. 1, No. 12, Vol. 2, No. 13, and Vol 2 No. 14, addressed to:

George Blair
Box 528
Dover, N. J.

which matters were non-mailable in that they were obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matters are of such vile, obscene, lewd and lascivious character that a further de-

scription thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 1 and 1461.)

[fol. 23] Count XXI

The Grand Jury further charges:

1. On or about the 30th day of June, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters, to wit, a quantity of magazines entitled "Good Times", described further as Vol. 2 No. 15, addressed to:

King's News
250 E. Fifth St.
Cincinnati, Ohio

which matters were non-mailable in that they were obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matters are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

Count XXII

The Grand Jury further charges:

1. On or about the 10th day of June, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters, to wit, a quantity of magazines entitled "Good Times", described further as Vol. 2 No. 14, addressed to:

[fol. 24] Bell Block News Store
606 Vine St.
Cincinnati, Ohio

which matters were non-mailable in that they were obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matters are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

Count XXIII

The Grand Jury further charges:

1. In or about April, 1955, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matters, to wit, "Stereoptic Nude Show", "Wallet Nudes", and "2 Undraped Stars", addressed to:

E. C. Weatherdon Jr.
6, Barnes Rd.
St. Johns, Newfoundland
Canada

which matters were non-mailable in that they were obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matters are of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

[fol. 25]

Count XXIV

The Grand Jury further charges:

1. On or about the 10th day of March, 1953, at the Southern District of New York, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain

matter, to wit, a book entitled "American Aphrodite", described further as Vol. 1 No. 3, addressed to:

Archie Lovejoy
R.R. #5
Cordele, Ga.

which matter was non-mailable in that it was obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matter is of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

Count XXV

The Grand Jury further charges:

1. On or about the 29th day of December, 1954, at the Southern District of New York, Samuel Roth, the defendand herein, unlawfully, wilfully and knowingly deposited and caused to be deposited for mailing and delivery certain matter, to wit, a book of photographs entitled "Photo and Body No. 4", addressed to:

[fol. 26] Whispering Pines TRCT
Rte. 5.
Aiken, South Carolina

which matter was non-mailable in that it was obscene, lewd, lascivious, filthy and of an indecent character.

2. The aforesaid non-mailable matter is of such vile, obscene, lewd and lascivious character that a further description thereof would defile the records of this Court, and therefore such further description is not set forth in this indictment.

(Title 18, United States Code, Sections 2 and 1461.)

Count XXVI

The Grand Jury further charges:

1. That from in or about March, 1951, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Samuel Roth, the defendant herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree with Chief Miller, G. I. Distributors, Inc., Morris Sorkin, Philip S. Foner, Remainder Book Company, Abraham Lieberman, Book Sales, Inc., and divers other persons to the Grand Jury unknown, to commit offenses against the United States in violation of Title 18, United States Code, Section 1461.

2. It was part of said conspiracy that said defendant and co-conspirators would publish, print, distribute, deposit and cause to be deposited for mailing and delivery obscene, lewd, lascivious and filthy books, pamphlets, pictures, papers, letters, writings, prints, packets, packages, articles and other publications and things of an indecent character.

[fol. 27] Overt Acts

In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York:

1. On or about the 3rd day of April, 1953, defendant Samuel Roth and co-conspirator Chief Miller affixed their signatures to a document commencing with the words "Agreement between Chief Miller, acting for G. I. Distributors, Inc., and Samuel Roth, acting for Seven Sirens Press Inc., for the distribution of a monthly magazine entitled "Good Times: A Review of the World of Pleasure".

2. On or about the 10th day of June, 1955, co-conspirator Book Sales, Inc. deposited and caused to be deposited for mailing and delivery a package addressed to:

Bell Block News Store
606 Vine St.
Cincinnati, Ohio.

3. On or about the 18th day of April, 1955, co-conspirator Remainder Book Company deposited and caused to be deposited for mailing and delivery a package addressed to:

Clinton Bookshop
138 S. Clinton
Rochester, N. Y.

4. On or about the 9th day of May, 1955, co-conspirator G. I. Distributors, Inc., deposited and caused to be deposited a package addressed to:

King's News,
250 E. Fifth St.,
Cincinnati, Ohio.

(Title 18, United States Code, Section 371.)

——— ———, Foreman. Lloyd F. MacMahon, United States Attorney.

[fol. 28] In United States District Court

Charge of the Court

The Court: Ladies and gentlemen of the jury: The time has now arrived in this case when it becomes my duty to charge you as members of this jury and to give you the law in reference to this particular case, and then you apply that law to the facts as you find them from the testimony of witnesses and from the exhibits.

The United States of America here charges the defendant, Samuel Roth, with twenty-three different violations of Section 1461 of the United States Code, Title 18, which in part defines as a crime the depositing or causing to be deposited for mailing obscence, lewd, lascivious or filthy matter. The defendant pleads not guilty to those charges. That plea is a denial by the defendant of each and every material allegation made against him by the United States of America.

A grand jury heretofore indicted the defendant for the crime here charged. This indictment is no proof of guilt. That is the law. The indictment is simply an accusation

and proves nothing. It is a cardinal principle of our system of justice that every person accused of crime is presumed to be innocent until guilt is established by proof sufficient in law. That presumption protects the defendant here at every stage of this trial. That presumption follows this case as it now goes to you. That presumption may be repelled or overthrown only by your verdict. Thus, the United States of America, who are the complainants in this case, have the burden of proof. The defendant, as I have said, denies each and every material allegation the United States of America makes against him.

He may not be found guilty by you unless his guilt of each and every essential element of the crimes charged against him is established by the United States of America and by the character and quality of proof required by law. [fol. 29] It is our theory of trial by jury that a jury's verdict should represent a concurrence or agreement of the individual judgments of twelve reasonable persons. I do not suggest that any of you are to refuse to consider or discuss the opinions of his fellow jurors, but I do charge you that each of you individually must be convinced of the guilt of the defendant by legally satisfactory evidence before you can return a verdict of guilty against him. Such verdict must be unanimous.

In this case the United States of America charges Samuel Roth with twenty-three different crimes. The burden of establishing these crimes is, I repeat, upon the United States of America, and that burden the United States of America must sustain by the character, quality and degree of proof, which shall satisfy you of the guilt of this defendant beyond a reasonable doubt.

What do I mean by the words "reasonable doubt"? There are no plainer words than the words "reasonable doubt." The term defines itself. You may, however, be aided by the idea of what a reasonable doubt is not. A reasonable doubt is not a mere possible doubt; not a vague nor fanciful doubt. In this case a reasonable doubt of the defendant's guilt of the crime charged by the United States of America is such a doubt thereof as a rational man or woman would consider well-founded after full and fair deliberation upon all the credible and trustworthy evi-

dence in the case, or, as has been stated, a doubt for which a reason can be given. Such a doubt in this case entitles the defendant to a verdict of not guilty.

In consequence, the law is such that in a criminal case it is enough if proved that the defendant's guilt be established beyond a reasonable doubt, not beyond all possible doubt.

[fol. 30] You are the exclusive, the sole judges of the questions of fact in this case, and those questions of fact must be decided by you upon your own responsibility and by you alone. You are bound, nevertheless, to receive as law what is laid down as such by the Court. You are instructed of course that a defendant is not obligated to prove that he is innocent of the charges made against him. On the contrary, the burden of proving his guilt beyond a reasonable doubt is upon the Government and remains with the Government throughout the trial. If the Government has failed to satisfy you beyond a reasonable doubt that the defendant is guilty, you must acquit such defendant.

The burden of proving guilt beyond a reasonable doubt, as I have explained to you, applies to each and every essential element which is part of the offense charged, and which elements I shall call your attention to shortly. The failure of any defendant to take the witness stand to testify in his own behalf does not create any presumption against him, and you must not permit that fact to weigh in the slightest degree against him, nor should this fact enter into your deliberations or discussions in any manner.

It is important in a government such as ours that its laws be enforced, not only for the maintenance of the government, but also for the protection of each of us, in our security, property, safety and rights. On the other hand, there is no dearer right belonging to all of us than to be protected in our liberty if we have done nothing to curtail or to deserve, rather, the curtailment.

In your determination, therefore, you are not to be guided or governed in any way by passion, prejudice, public opinion or sympathy. Both the public and the defendant have the right to demand that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give each your conscientious judgment.

[fol. 31] It is, as you know, only the testimony from the witness stand and the exhibits that constitute evidence, Statements of counsel or any statements contained in any questions asked of a witness by counsel are not evidence.

The indictment alleges that the defendant, Samuel Roth, knowingly deposited for mailing or caused to be deposited for mailing obscene, lewd, lascivious and filthy matter. In particular, the indictment charges the defendant in the first seventeen counts, excluding the twelfth, which has been withdrawn from your consideration, with mailing obscene circulars and advertising which are obscene, one, on their face, and, two, in that they give information where and how obscene matter may be obtained, to the sixteen different persons who testified here as receiving them.

In counts 18 to 24 the indictment charges the defendant with mailing certain obscene publications and pictures, which were advertised in one or more of those circulars. The publications were described as Stereoptic Nude Show and Wallet Nudes in count 18; a book of photographs entitled Nus in count 19; eight magazines entitled Good Times in count 20; a quantity of magazines entitled Good Times, Vol II, No. 15 in count 21; a quantity of magazines entitled Good Times, Vol. II, No. 14 in count 22; Stereoptic Nude Show, Wallet Nudes and 2 Undraped Stars in Count 23; the book American Aphrodite in count 24.

As I have already said, the crimes charged here are defined by the statute, Title 18, Section 1461 of the U. S. Code, which insofar as applicable herein provides as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character, and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving informa-
> [fol. 32] tion directly or indirectly, where or how or from whom or by what means any such matters, articles or things may be obtainable, is declared to be non-mailable, and whoever knowingly deposits for mailing or delivery anything declared by this section to be non-mailable, is guilty of the offense."

The essential elements of the offense are, one, that the defendant knowingly deposited or caused to be deposited in the United States mails the offending printed matter or the advertising information as to where, when, how or from whom such matter could be obtained; and, two, that in fact that matter was obsence, lewd, lascivious or filthy.

Before you find the defendant guilty you must find beyond a reasonable doubt that the Government has established each essential element. If not, your verdict must be not guilty. Of course, if you do find that they have established all the essential elements of the crimes as charged, then of course your verdict must be guilty.

As to the first element, that is, the mailing, you should have little if any difficulty in reaching a conclusion. The defendant, through his counsel, has conceded the mailing or the causing to be mailed all the matter referred to in the various counts of the indictment. This concession is the equivalent of testimony of a witness and must be accepted by you with the same force and effect. However, you are still required to decide upon all the evidence beyond a reasonable doubt that the mailings by the defendant or under his direction, as charged in the indictment, did in fact occur, and as I have already said, there should be little difficulty in deciding this issue.

The real disputed issue is the second element of the offense—the nature and character of the circulars, book, pictures and publications. Who determines that issue?

[fol. 33] You, as members of the jury, are the sole and exclusive judges of the facts, and it is for you to decide, as you decide all questions of fact.

What is meant by "obscene, lewd, lascivious and filthy" and what standards do you apply in reaching a determination whether the pictures, circulars or book are of that character?

The words "obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts. The test is not whether it

would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. "Filthy" as used here must also relate to sexual matters. It is distinguishable from the term "obscene," which tends to promote lust and impure thoughts. "Filthy" pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by [fol. 34] present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

The defendant here has called certain expert witnesses. Their testimony has been admitted for the purpose of showing you what the common conscience of the community is today. You are not bound by it. You are at liberty to accept or reject, in whole or in part, such testimony, accepting only that portion which commends itself to your judgment. These witnesses gave their opinions as to the impact this literature would have on the general public. Whether or not these pictures and publications are of such a character as to stir sexual impulses or arouse lustful passions or are revulsive or disgusting must be determined by you and you alone, according to the standards I have given you.

The testimony of an expert witness is treated no differently than that of any other witness. You weigh his or her interest in the case, possible bias or prejudice, manner of testifying, and in general evaluate the testimony in ac-

cordance with your good, sound common sense and what appeals to your reason.

The defendant also introduced in evidence certain books, bestsellers, and excerpts therefrom, as some evidence of the current reading habits of the public. I instruct you what weight if any you give to this evidence rests with you. I caution you you are not required to limit yourselves to a consideration of one or all of the books introduced by the defendant as examples of present-day standards of literary taste. You may consider and compare the number of people who read these books with the number of people who make up our community, and it may be your judgment that some or all of the books introduced by the defendant are obscene themselves, in accordance with the standard I have given you.

[fol. 35] In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.

Insofar as you are concerned, this indictment consists of twenty-three counts. You are not to concern yourselves with counts 12, 25 and 26, as they have been removed from your consideration. You are to consider each count separately, in accordance with the rules I have given you.

I repeat, in considering counts 1 to 17, excepting 12, which have to do with the circulars, you must consider whether they are obscene on their face; that is one, or, two, if they give information where and how obscene matter may be obtained. If you find that a circular was not obscene on its face, you must consider it in the light of those pictures and publications advertised in that particular circular, and which have been introduced in evidence before you. If you also find those pictures and publications not obscene, then your verdict must be not guilty on that particular count.

It follows, of course, if you were to find the defendant not guilty on all of the first seventeen counts, you would have to find him not guilty on the remaining counts.

I have sought to avoid any comments which might sug-

gest my personal view as to conclusions to be drawn by you from the evidence. You are not to assume that I have any view as to the guilt or innocence of the defendant. The determination of that question is your sole and exclusive responsibility. If in the course of these instructions I have made reference to any evidence which does not accord with your recollection, you are to disregard that statement by me. It is your recollection of the evidence and not the state-
[fol. 36] ments of the Court or the statements of counsel which govern. The actions of the Court during the trial in ruling upon motions or overruling objections or in sustaining objections are not to be taken by you as any indication of the guilt or innocence of the defendant. They are matters of procedure and of law, with which you, the jury, have no concern.

Also, as I previously instructed you during the course of this trial, you are to disregard any testimony I have stricken from the record, and it is not to be considered in your deliberations on the issues in this case.

Under your oaths as jurors, you cannot allow consideration of punishment which might be inflicted upon a convicted defendant to influence your verdict in any way or in any sense to enter into your deliberations. The duty of imposing sentence in the event of conviction rests exclusively upon the Court. Your function is solely to determine the guilt or innocence of the defendant upon the basis of the evidence.

If the Government has established the guilt of the defendant under the law beyond a reasonable doubt, as I have defined it to you, you should find him guilty. If the
[fol. 37] Government has not so established his guilt, you should find him not guilty. It would be a great injustice to convict the defendant if there is a reasonable doubt of his guilt on the evidence under the law. It would be a mockery of justice to acquit him if his guilt has been established under the law beyond a reasonable doubt.

Any exceptions to the charge, Mr. Atlas?

Mr. Atlas: Well, my only exception, your Honor, is that you haven't charged certain of my requests in haec verba, but I think you have generally included them.

The Court: Well, except as charged, I am not passing upon any of the requests except as charged, and I will deny any further requests, except if you have any specific one that you request of me to charge.

Mr. Atlas: Your Honor has my sheet, but I think I can remember it.

I would like your Honor to charge that "coarse," in and of itself is not obscene.

The Court: I didn't get that.

Mr. Atlas: That the word "coarse," c-o-a-r-s-e, is not obscene.

The Court: I so charge.

Mr. Atlas: I will ask your Honor to charge that the nude in and of itself is not obscene.

The Court: I so charge.

I covered that in my main charge.

Mr. Atlas: I think my only objection is that it wasn't done in haec verba.

May I see that sheet?

The Court: Yes, you may.

Mr. Atlas: If you please.

And I ask your Honor to charge that the Court is not a censor.

The Court: Oh, I charge that.

Mr. Atlas: Yes, sir.

[fol. 38] The Court: It never sets itself up to be one.

Mr. Atlas: I don't mean your Honor. I mean the whole——

The Court: I thought you said the Court.

Mr. Atlas: The whole system, the whole Court is not a censor.

The Court: I so charge.

Mr. Atlas: I think, beyond that, your Honor has fairly covered everything, and I have no other exceptions.

The Court: Any requests from the Government?

Mr. Leisure: Nothing further, your Honor.

The Court: All right.

Now at this time I will discharge the two alternate jurors. You are discharged from any further participation in this case. The Court wants to extend to both of you its thanks for your careful attention that you have given, even though you were alternates, and I will request that you express no opinion about the case until after the jury returns with its verdict.

You are excused with the thanks of the Court.

(Alternates excused.)

The Court: Will you swear the officers, please?

(Marshals sworn.)

The Court: I think, if it is agreeable to counsel, in this particular case the indictment should go with the jury and also the exhibits, even if they don't request it.

Mr. Atlas: I won't have any objection if the clerk writes across the face of the counts that have been dismissed, "Dismissed".

The Court: Oh, yes. That is 12, 25 and 26.

Mr. Atlas: That's right, sir. I have no objection to them seeing all the exhibits and everything.

The Court: I am going to direct at this time—now you jurors are going to like what I am going to say—I am going to direct, before you start your deliberations, that the Gov- [fol. 39] ernment take you out and buy you lunch. Start your deliberations after lunch.

Is that all right? Is that satisfactory?

I thought that would be good.

They don't need to take these things with them now. When you come back, you can send in for a copy of the indictment and the exhibits, and by consent of counsel you can have them.

All right, the jury may retire.

(The jury retired at 12:30 P.M.)

The Court: This court will recess, awaiting the verdict of the jury.

Mr. Atlas: I trust that your Honor is continuing the defendant's bail during deliberations and so forth.

The Court: Of course.

Mr. Atlas: I am very grateful to you, sir.

The Court: Announce a recess of this court, pending a verdict of the jury, Mrs. Clerk.

(Recess.)

(At 2:50 P. M., the following took place in the robing room:)

The Court: The Court received a note from the jury, which reads as follows:

> "Chart relating the indictment numbers to the exhibit numbers."
>
> Signed "Edward Craig."

It appears that that chart was not introduced in evidence. However, have you any objection to the chart going to the jury, Mr. Leisure?

Mr. Leisure: No, I don't have at all.

The Court: Have you, Mr. Roth?

Mr. Roth: None at all.

The Court: Have you, Mr. Atlas?

[fol. 40] Mr. Atlas: No, sir.

The Court: All right. Then upon consent of both counsel and the defendant the Court will turn a copy of the chart over to the marshal for delivery to the jury.

Mr. Atlas: Thank you, Judge.

(The following took place at 6:07 P. M. in the robing room:)

The Court: I have another note from the jury, gentlemen. It says:

> "We need a clarification of your charge referring to counts 1 to 17 of the indictment as relating to the remainder of the counts.
>
> "Specifically, did you say if the defendant is 'Not Guilty' on counts 1 to 17, we must find him 'Not Guilty' on the remainder, and why?"

Mr. Leisure: May I make this request, your Honor, at this time? The charge as it was put was in a negative

form, that is, "If you do not convict on the first seventeen, you cannot convict on the others." I think, in the Government's interest, I should request that you further charge that if they find that the exhibits are obscene, they must find that the circulars which advertised those exhibits are also obscene. I think that that would be a fair charge. It would be both negative and positive, and I think it would clarify it for them.

The Court: Do you have any objection to that, Mr. Atlas?

Mr. Atlas: I would like to think about it for a minute. Well, if you do that, you would have to say that if they find that the exhibits, meaning the publications themselves, are not obscene, then the circulars are not obscene.

Mr. Leisure: That isn't necessarily so. The circular can be obscene on its face.

[fol. 41] Mr. Atlas: You have made that point, but I think——

Mr. Leisure: I think it is the law to say that if the exhibit, the publication, is obscene, that then any circular that advertises it is obscene. That certainly is not a misstatement of the law.

Mr. Atlas: That would be so, if the circular advertises it, but I think that it is probably a mistake to connect the two, Judge, because the question indicates that they are unable to reason about it the way the legal mind will reason about it.

Mr. Leisure: The question indicates that they don't understand it, and I think it is a fair thing to charge them both ways, and I think it would clarify it for them.

Mr. Atlas: Wouldn't it be simpler to say to them that if they find that the exhibits are not obscene, they then go back and find out whether the circulars are of themselves as publications obscene?

Mr. Leisure: I have no objection to that at all. The only thing is, I want the affirmative side charged too, and that is why I think it is a fair statement to say that if the exhibits are obscene, the publications are obscene, then any circular that advertises them is obscene, because the law is that any circular that advertises an obscene publication, even if it is just a typewritten page, is obscene.

Mr. Atlas: You are running into some difficulty, there because the circulars which you are complaining of do not

in every instance refer to American Aphrodite, No. 3. They may be referring to another issue of American Aphrodite. That is the first thing. And they do not necessarily advertise the issues of Good Times which are involved. That makes it very difficult.

Mr. Leisure: But it still is clear that if the exhibit is obscene, any circular that advertises it is obscene. That is perfectly clear.

Mr. Atlas: That is true, but then you have to tell them that the only issues of these magazines that are involved [fol. 42] are the issues of the exhibits, and that advertising another issue of the same magazine doesn't give them the privilege of saying the circular is obscene.

Mr. Leisure: That is the law. If they are going to have to split it, they will have to decide on it that way.

Mr. Atlas: I am afraid we are not helping the Judge.

Mr. Leisure: I have made my point. I won't argue further.

The Court: I am not going to have you make any requests out in open court, either one of you. I won't go for that. I got you in here to see whether we can agree on what I could tell them, so that there would be no question about it, but I am not going to have either one of you make a request that I further charge. I can't go for that.

Mr. Leisure: I won't do that.

Mr. Atlas: What was the question that they are asking, the second part?

The Court: "Did you say if the defendant is 'Not Guilty' on counts 17, to we must find him 'Not Guilty' on the remainder, and why?"

Mr. Leisure: I think you can explain to them that a circular is obscene in either one of two ways: It can be obscene on its face, or if it advertises something that is obscene, then it is also obscene, so that they must look to the publication and see if the material advertised is obscene.

In other words, it is possible in this type of case to have a typewritten page which says, "Send $5 for American Aphrodite", and that is obscene if American Aphrodite is obscene.

Mr. Atlas: May I say this. Would it be best, Judge,

and wouldn't everybody be best served if you were to answer that second part of the question saying that if they find that the circulars are not obscene, then they will have to find that any of the exhibits mentioned in them are also not obscene?

[fol. 43] Mr. Leisure: I would like them to know why, the reason.

Mr. Atlas: I haven't finished.

Mr. Leisure: I am sorry.

Mr. Atlas: The reason being that such a circular could not be deemed to have been advertising where you could get obscene literature.

Mr. Leisure: I object to it only because it is summation.

The Court: You can't charge it both ways. There is only one way you can do it, and you can't do it without some danger.

Mr. Leisure: No, you can charge that if the publication is obscene, then the circular has to be obscene.

Mr. Atlas: If it advertises the publication.

Mr. Leisure: Yes. I think that is not unfair. I think it is a fair statement of the law.

Mr. Atlas: We are in your hands, Judge, I guess.

The Court: Well, supposing you go out. I want to give it a little thought.

Mr. Leisure: All right.

The Court: I will call you back when I get something worked out.

(Both counsel left the robing room and were later recalled.)

The Court: I am going to have the stenographer read my charge, starting in with "Insofar as you are concerned this indictment consists of twenty-three counts. You are not to concern yourselves with counts 12, 25 and 26, as they have been removed from your consideration. You are to consider each count separately in accordance with the rules I have given you. I repeat, in considering counts 1 to 17, excepting 12, which have to do with the circulars, you must consider whether they are obscene on their face, that is one, or two, if they give information where and how ob-

scene matter may be obtained. If you find that a circular was not obscene on its face, you must consider it in the [fol. 44] light of those pictures and publications advertised in that circular and which have been introduced in evidence before you."

So that is in there.

"If you also find these pictures and publications not obscene, then your verdict must be not guilty on that particular count."

"It follows, of course, if you were to find the defendant not guilty on all of the first to seventeen counts, you would have to find him not guilty on the remaining counts."

Now I am going to ask them a question: do they have any question? And I will answer the question which I know I am going to get, this way:

"Or if they give information where and how obscene matter may be obtained; that if they gave information where and how obscene matter may be obtained, they can take into consideration in determining that question whether the exhibits introduced on the last seven counts are obscene."

Mr. Atlas: I just wanted to call your attention that the defendant hasn't been in here these couple of times.

The Court: He doesn't have to be in here.

Mr. Atlas: I wanted to make sure.

The Court: No, he is out there when the jury comes in and the whole thing will be done there. He doesn't have to be here.

(The following took place in the courtroom at 6:25 P. M., the jury being in the box:)

The Court: Now, the Court is in receipt of a communication from the jury which he will now read:

"We need a clarification of your charge referring to counts 1 to 17 of the indictment as relating to the remainder of the counts.

[fol. 45] "Specifically, did you say if the defendant is 'not guilty' on counts 1 to 17, we must find him 'not guilty' on the remainder, and why?"

I am going to have the stenographer read back to you now that portion of my charge which deals with those questions which you asked, and I would ask, as you have done all along, that you pay strict and particular attention to what the stenographer is about to read.

(Portion of charge as indicated in chambers read.)

The Court: After listening to that, does that help any? Or do you have any specific question in addition to that that you want to ask the Court?

Juror No. 10: I think that answers the question that we had, as far as I am aware. That was the only question, and that answers it fully.

Juror No. 2: May I ask a question, your Honor? I just noticed something in the reading of your charge, that you state there are counts up to 23, and especially 24, which includes Aphrodite, is omitted in that charge. It is only up to 23. Is there any reason for that, may I ask?

The Court: No, that isn't so. I say, "In considering counts 1 to 17, excepting 12, of course", and then I say "It follows, of course, if you were to find the defendant not guilty on all of the first 17 counts, you would have to find him not guilty on the remaining counts". I don't mention anything about 23 or anything that you say about it. What the Court said in that charge is that in determining counts 1 to 17, you are to consider whether they are obscene on their face, that is one. Or, if they give information where and how obscene matter may be obtained. If you find that the circular was not obscene on its face, you must consider it in the light of those pictures and publications advertised in that particular circular, and which have been introduced in evidence before you. In other words, what the Court [fol. 46] says is that in determining the second question, if they are not obscene on their face, if they give information where and how obscene matter may be obtained, in determining that question you have a right to take into consideration the exhibits which are introduced under the last seven counts which are now before you in the indictment, in determining whether or not they advertise, if they give information where and how obscene matter may be obtained.

Does that answer your question? Does that clear it up?

(Jury nodded assent.)

The Court: All right.

Now, ladies and gentlemen of the jury, would you like to get your dinner, have dinner before you go back for your deliberations?

Juror No. 11: It would give us a little rest.

The Foreman: I think it would be better.

The Court: Well, the reason I ask you is because it is a little bit hard to have to do it, and we will have a little trouble finding a place to eat downtown if we do it a little later, so I am going to direct that the jury be taken to dinner and come back after dinner and resume your deliberations.

Juror No. 5: I would just like to suggest, your Honor, that we be given just about three minutes together before we go to dinner, to make sure we have a meeting of the minds on what you have just told us.

The Court: All right, go ahead. When you get ready, rap on the door and I will send a marshal in.

The Foreman: Your Honor, would it be possible for the stenographer to transcribe that portion of the charge, have it right there?

The Court: I can't do that. I don't think I have any right to give you the charge. If it isn't clear to you, I will have him read it again.

The Foreman: I think we understand.

* * * * * * *

[fol. 47] In United States District Court

Excerpts from the Summation of the Assistant United States Attorney

Mr. Leisure: * * * we have called you here today to show you what has been sent through the mails, and to ask you to help the United States Government to enforce the law that has already been passed.

* * * * * * *

* * The rest of the counts were proved by the people who actually received them and they all came here, and

some came from quite some distance, and some came at quite some inconvenience to themselves, in order to stand up for what they thought is right.

. . . . . .

There was Mr. Feldhouse, who comes from Parma, Ohio; a mother, who said her son had received this stuff in the mails. There was Mrs. Klovski, who came all the way from Dearborn, Michigan, here, to tell you about it. There was the Rev. L. W. Rockwell, who came here. He was a man, he told you, who is in charge of 88 delinquent children. Can you imagine the audacity of that man, mailing that envelope to the Uhlich Children's Home? That wasn't even addressed to an adult there. You have seen it, and I don't want to review the evidence in this case because I think you have certainly had a good dose of it.

And that woman who worked for Mr. Roth took the stand and she testified that this was typewritten; this wasn't a stencil. Somebody in that organization sat down and typed that out, "Uhlich Children's Home," and that is what they sent them.

Then there was Mr. Bissler, and there has been an awful lot of wisecracks in the case about Alliance, Ohio. Well, he is a plumber, and if you have lost a little bit of faith in mankind throughout this trial, just let me remind you that a plumber had the nerve not only to complain about this [fol. 48] but come all the way here to New York and testify and take the stand; and it isn't any fun to get up and be cross-examined and be asked whether or not your children are encouraged to read the Bible.

. . . . . .

Well, those people have come in here and they have done everything that they can do; and I will say to you that they reminded me of you people, they reminded me a lot of you people and I don't think I have to stretch my imagination very far to think that if this kind of thing had been pouring into your homes, every one of you, or addressed to your children, that you would have been on the witness stand yourself, standing up for what you think is right.

Now those people have done everything they can do, and

they are interested in this case; they are interested to see what you are going to do now.

You are in a much stronger position than any one of those people, because you hold in your hands the power to make a final determination of this.

. . . . . .

Well, putting in those counts and those exhibits gave you a chance to see your post office employees in action. Do you remember the tall man from Georgia that came all the way up from Cordele, and the gentleman from Newfoundland who came all the way down from Canada, and the soft-spoken Mr. Nelson, who came up from Washington to testify? And there is Mr. Carr here, who sat throughout this case with me and who has worked months and months on this case before we ever came to trial.

I get a chance to stand up here now and do all the talking, but those men have done a tremendous job on this, and in [fol. 49] order to get it into court so that we can do something about this kind of thing. I think you can be proud of them. They are first-class public servants, and the defense would have you believe that something is wrong in the way they proceeded here on this test letter situation. They have enough respect for their own rules and regulations in the post office so that they won't open a firstclass letter. But it will be a sad day for the administration of justice when our hands are tied just became somebody uses the firstclass mail in order to distribute this kind of thing. So we went to all that kind of trouble to set that thing up in Georgia, and in Dover, and remote places like that, because we wanted to do it right, and because the courts of law have held that that is the proper way to proceed. We called those people from a great distance and at a great inconvenience because we want to do it right, not because we wanted to do it wrong.

. . . . . .

I told you in my opening statement that there are many people who are watching this, because there is money in this; this stuff will sell. They are going to be interested to see whether you are going to make it legal or not. Let

me say this: if you want me and these post office inspectors to continue to work and fight to stop this kind of thing, you can tell us that by bringing back a verdict as quickly as you possibly can, convicting him on every count in this indictment, and we will do it. And if you don't care, or if you want to continue it, then acquit him, and I can assure you that the sewers will open.

* * * * * * * *

[fol. 50] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT—October Term, 1955

No. 387

(Argued June 6, 1956 Docket No. 24030)

UNITED STATES OF AMERICA, *Appellee*

v.

SAMUEL ROTH, *Appellant*

Before: CLARK, *Chief Judge*, and FRANK and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, John M. Cashin, *Judge*.

Samuel Roth appeals from his conviction for mailing obscene matter in violation of 18 U. S. C. § 1461. Affirmed.

GEORGE S. LEISURE, JR., Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for appellee*.

PHILIP WITTENBERG, New York City (Wittenberg, Carrington & Farnsworth and Irving Like, New York City, on the brief), *for appellant*.

[fol. 51] OPINION—September 18, 1956

CLARK, *Chief Judge*:

This is an appeal by Samuel Roth from his conviction for violation of 18 U. S. C. § 1461. The indictment contained twenty-six counts charging the mailing of books, periodicals, and photographs (and circulars advertising some of them)

alleged to be "obscene, lewd, lascivious, filthy and of an indecent character." Three counts were dismissed. After a trial the jury found defendant guilty on four counts, and not guilty on nineteen. The trial judge sentenced defendant to five years' imprisonment and to pay a fine of $5,000 on one count, while on each of the other three counts he gave a like term of imprisonment, to run concurrently, and a $1 fine remitted in each case. On this appeal, defendant claims error in the conduct of the trial, but once again attacks the constitutionality of the governing statute.

This statute, 18 U. S. C. § 1461, originally passed as § 148 of the act of June 8, 1872, 17 Stat. 302, revising, consolidating, and amending the statutes relating to the Post Office Department, and thence derived from Rev. State. § 3893, herein declares unmailable "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character," [1] and makes the knowing deposit for mailing of such unmailable matter subject to a fine of not more than $5,000 or imprisonment of not more than five years, or both. In *United States* v. *Rebhuhn*, 2 Cir., 109 F. 2d 512, 514, certiorari denied *Rebhuhn* v. *United States*, 310 U. S. 629, Judge Learned Hand, in dealing with a claim of unconstitutionality, pointed out that it had been overruled in *Rosen* v. *United States*, 161 U. S. 29, "and many indictments have since been found, and many persons tried and convicted. * * * If the question is to be reopened the Supreme Court must open it." Since [fol. 52] that decision many more cases have acknowledged the constitutionality of the statute, so much so that we feel it is not the part of responsible judicial administration for an inferior court such as ours, whatever our personal opinions, to initiate a new and uncharted course of overturn of a statute thus long regarded of vital social importance and a public policy of wide general support. It is easy, in matters touching the arts, to condescend to the poor troubled enforcement officials; but so to do will not carry us measurably nearer a permanent and generally acceptable solution of a continuing social problem.

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[1] As pointed out below, the quoted wording was somewhat expanded by Congress in 1955, after the commission of the offenses here involved.

Against this background we are impressed by the decision this year of a great court in *Brown* v. *Kingsley Books, Inc.*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 641, 642, where, accepting general constitutionality of such legislation, the decision breaks new ground in upholding authorization of preventive relief by way of injunction at the suit of a public officer.[2] In his opinion, Judge Fuld summarizes the controlling law thus: "That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court [citing cases] and by the United States Supreme Court [citing cases]." Among cases from New York which he cites is *People* v. *Doubleday & Co.*, 297 N. Y. 687, 77 N. E. 2d 6, affirmed by an equally divided court, 335 U. S. 848, [fol. 53] while among the cases in the United States Supreme Court upon which he relies are *United States* v. *Alpers*, 338 U. S. 680; *Winters* v. *People of State of New York*, 333 U. S. 507, 510, 518, 520; and *United States* v. *Limehouse*, 285 U. S. 424. He goes on to say: "Imprecise though it be—its 'vague subject-matter' being largely 'left to the gradual development of general notions about what is decent' (per L. Hand, J., *United States* v. *Kennerley*, D. C., 209 F. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard." In the case last cited, Judge Haind asked, "* * * should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" and continued:

[2] The injunction against sale of paper-covered booklets "indisputably pornographic, indisputably obscene and filthy"—the words are Judge Fuld's, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 640—was granted under a 1941 statute, N. Y. Code Cr. Proc. § 22-a, on suit of the Corporation Counsel of the City of New York. While the court was unanimous in holding the statute consitutional and the injunction proper, there were two opinions—a detailed analysis of the legal background by Judge Fuld, concurred in by two other judges, and a brief and more formal statement by Judge Desmond, concurred in by two other judges.

"If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence." In quoting this with approval, the Ninth Circuit has recently said: "We think Judge Learned Hand was in the best of his famous form in his happy use of words." *Besig* v. *United States*, 9 Cir., 208 F. 2d 142, 147.

So this important social problem, which has come down to us from English law and which has led to statutes of a generally similar nature in almost all of the other jurisdictions in this country, see *Brown* v. *Kingsley Books, Inc.*, *supra*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639; Note, 22 U. of Chi. L. Rev. 216, has resulted in a general judicial unanimity in supporting such prosecutions. There is a considerable body of additional precedents beyond those cited above, both in the Supreme Court of the United States and in other federal jurisdictions, of which various examples are given in the footnote.[3] It will not do to distinguish these [fol. 54] cases as dicta or suggest that they have not considered modern problems. They are too many and too much of a piece to allow an intermediate court to make an inference of doubt in the circumstances. We can understand all the difficulties of censorship of great literature, and indeed the various foolish excesses involved in the banning of notable books, without feeling justified in casting doubt upon all criminal prosecutions, both state and federal, of commercialized obscenity. A serious problem does arise when real literature is censored; but in this case no such issues should arise, since the record shows only salable pornography. But even if we had more freedom to follow an im-

[3] See, e.g., *Ex parte Jackson*, 96 U. S. 727; *Swearingen* v. *United States*, 161 U. S. 446; *Dunlop* v. *United States*, 165 U. S. 486; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508; *Robertson* v. *Baldwin*, 165 U. S. 275, 284; *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Schindler* v. *United States*, 9 Cir. 221 F. 2d 743, certiorari denied 350 U. S. 938; *United States* v. *Hornick*, 3 Cir., 229 F. 2d 120, affirming D. C. E. D. Pa., 131 F. Supp. 603; *Roth* v. *Goldman*, 2 Cir., 172 F. 2d 788, certiorari denied 337 U. S. 938.

pulse to strike down such legislation in the premises, we should need to pause because of our own lack of knowledge of the social bearing of this problem; or consequences of such an act;[4] and we are hardly justified in rejecting out of hand the strongly held views of those with competence in the premises as to the very direct connection of this traffic with the development of juvenile delinquency.[5] We conclude, therefore, that the attack on constitutionality of this statute must here fail.

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[4] See Fuld, *J.*, in *Brown v. Kingsley Books, Inc.*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 641, n. 3: "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene in writings and other mass media, on the mind and behavior of men, women and children. (See e.g., Jahoda and Staff Research Center for Human Relations, New York University [1954], The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)"

[5] Sen. Rep. No. 113, 84th Cong., 1st Sess., supporting the 1955 amendment to § 1461 discussed below, has this to say: "The subcommittee of the Committee on the Judiciary investigating juvenile delinquency in the United States reports that the nationwide traffic in obscene matter is increasing year by year and that a large part of that traffic is being channeled into the hands of children. That subcommittee recommended implementation of the present statute so as to prevent the using of the mails in the trafficking of all obscene matter. The passage of S. 600 will contribute greatly in the continuing struggle to combat juvenile delinquency and the corruption of public morals." 2 U. S. Code Cong. & Adm. News 2211 (1955).

See also Chief Justice Vanderbilt, *Impasses in Justice*, [1956] Wash. U. L. Q. 267, 302: "(4) Our greatest concern with the oncoming generation, I submit, relates to the perversion of young minds through the mass media of the movies, television, radio, and the press, especially so-called comics. Wertham, Seduction of the Innocent (1954). See also Feder, Comic Book Regulation (Univ. of Calif. Bureau of Pub. Admin., 1955). The problem is only beginning to receive the consideration its seriousness calls for. Here is a

[fol. 55] Defendant, however, takes special exception to the judge's treatment in his charge of the word "filthy," asserting that he opposed this term to the other parts of the statute, so as to render the statute vague and indefinite. What the judge said was this: "'Filthy' as used here must also relate to sexual matters. It is distinguishable from the term 'obscene,' which tends to promote lust and impure thoughts. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arose a feeling of disgust and revulsion." But this seems to us in line with long-standing judicial definitions of the term. The words "and every filthy" were inserted in the statute at the time of the enactment of the Penal Code in 1909. And in *United States* v. *Limehouse*, *supra*, 285 U. S. 424, 426, in 1932, Mr. Justice Brandeis for the Court pointed out the obvious intent to add "a new class of unmailable matter—the filthy." As he definitely pointed out, this plainly covered sexual matters; and the Court, [fol. 56] so he said, had no occasion to consider whether filthy matter of a different character also fell within the prohibition. "We do not see how this case can be read other than as support for the interpretation made by the court below and for the validity of the Act as interpreted. Moreover, earlier it had been ruled by the Sixth Circuit in *Tyomies Pub. Co.* v. *United States*, 6 Cir., 211 F. 385, 390, in 1914, that the trial judge properly submitted the issue to the jury as to whether or not a picture was filthy with the explanation: "By the term 'filthy' is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing." This is in substance what Judge Cashin charged here. See also *United States* v. *Davidson*, D. C. N. D. N. Y., 244 F. 523, 534, 535; *Sunshine Book Co.* v. *Summerfield*, D. C. D. C., 128 F. Supp. 564.

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field in which the law schools are well equipped to furnish leadership in a controversy where rare discrimination and courage are required."

Perhaps scholarly research may suggest better statutes than we have; but it is doubtful if help can be found in such suggestions as for the inclusion in legislation of the enticing invitation, "For Adults Only." *Cf.* Ernst & Seagle, To the Pure 277 (1928).

Hence, having in mind Judge Hand's admonition in *United States* v. *Kennerley*, *supra*, D. C. S. D. N. Y., 209 F. 119, 121, that the jury must finally apply the standard thus indicated, we think there was nothing objectionable in the judge's instructions to the jury. Certainly, against this background, "filthy" is as clear and as easily understandable by the jury[6] as the terms "obscene" and "lewd" already committed to its care. Possibly some different nuances might have been given the term—though we are not sure what, nor are we given suggestions—but we cannot believe that the jury would have been helped. Nor did the defendant at the time find anything to question in the charge: his counsel, after the judge had granted all the specific additional requests he made, said that the judge had "fairly covered everything." Now he is not in a position to press this objection. Here we have more than a waiver by failure [fol. 57] to object. We have in fact an instance of submission of issues to the jury on more than a single ground which might have been separated had the parties so desired. Since no request for separate verdicts or for withdrawal of this issue from the jury was made, the conviction must stand as supported by the clear evidence of obscenity. *United States* v. *Masenich*, 2 Cir., 111 F. 2d 602, certiorari denied *Masenich* v. *United States*, 311 U. S. 650; *United States* v. *Smith*, 2 Cir., 112 F. 2d 83, 86; *United States* v. *Goldstein*, 2 Cir., 168 F. 2d 666, 672; *Claassen* v. *United States*, 142 U. S. 140, 147; *Stevens* v. *United States*, 6 Cir., 206 F. 2d 64, 66; *Todorow* v. *United States*, 9 Cir., 173 F. 2d 439, 445, certiorari denied 337 U. S. 925; *United States* v. *Myers*, D. C. N. D. Cal., 131 F. Supp. 525, 528. On either ground, therefore, this assignment of error must fail.

Our conclusion here settles the substantial issues on this appeal. As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a

[6] And by Judge Fuld and his colleagues; see *supra* note 2.

psychologist who stated that he would find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison. Very likely the jury's moderate verdict on only a few of the many counts submitted by the government and supported by the testimony of those who had been led to send their orders through the mail was because of this wide scope given the defense. As the judge pointed out in imposing sentence, defendant has been convicted several times before under both state and federal law. Indeed this case and our discussions somewhat duplicate his earlier appearance [fol. 58] in *Roth* v. *Goldman*, 2 Cir., 172 F. 2d 788, certiorari denied 337 U. S. 938.

Defendant claims error in entrapment because his advertisements were answered by government representatives. But this method of obtaining evidence was specifically approved in *Rosen* v. *United States*, *supra*, 161 U. S. 29, 42, and has been usual at least ever since: *Ackley* v. *United States*, 8 Cir., 200 F. 217, 222. In no event was there any improper entrapment. See *United States* v. *Masciale*, 2 Cir., Aug. 22, 1956. The government's summation in the case was within the scope of the evidence, and the court's charge was concise and correct. But one other matter needs to engage our attention: That was the defendant's claim of error in that the court charged with respect to the statute as it was at the time of the offenses, although it had been amended on June 28, 1955, or before the trial. But this amendment was designed to stiffen the Act and arose because in *Alpers* v. *United States*, 9 Cir., 175 F. 2d 137, a conviction for mailing obscene phonograph records was reversed on the ground that such records were not clearly embodied in the statutory language quoted above. Although this decision was reversed and the conviction reinstated in *United States* v. *Alpers*, *supra*, 333 U. S. 680, the Congress was so anxious that there be no loophole that it enacted an amendment making unmailable now "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."[7] It would seem clear, there-

[7] It also eliminated the former fifth paragraph now superfluous. See the Senate Report cited *supra* note 5.

fore, that defendant has no ground of complaint because he was tried under the statute existing at the time of his offense; and in no event could he have been harmed.

Judgment affirmed.

[fol. 59] FRANK, *Circuit Judge*, concurring:

The reference in Judge Clark's opinion to juvenile delinquency, might lead the casual reader to suppose that, under the statute, the test of what constitutes obscenity is its effect on minors, and that the defendant, Roth, has been convicted for mailing obscene writings to (or for sale to) children. This court, however, in *U. S. v. Levine*, 83 F. 2d 156 (C. A. 2), has held that the correct test is the effect on the sexual thoughts and desires, not of the "young" or "immature," but of average, normal, adult persons. The trial judge here so instructed the jury.*

On the basis of that test, the jury could reasonably have found, beyond a reasonable doubt, that many of the books, periodicals, pamphlets and pictures which defendant mailed were obscene. Accordingly, I concur.**

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* He said: "The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish. * * *" In other words, you must determine its impact upon the average person in the community."

** The statute condemns the mailing not only of "obscene" matter but also of "filthy" matter. Parts of the indictment here charged the defendant with mailing "filthy" publications. The trial judge told the jury they could convict the defendant for mailing a "filthy" publication, if they found that it treated "sexual matters in such a vulgar and indecent way so that it tends to arouse a feeling of disgust or aversion." The following contention might be urged:

> The very argument advanced to sustain the statute's validity, so far as it condemns the obscene, goes to show the invalidity of the statute so far as it condemns "filth," if "filth" means that which renders sexual desires "disgusting." For if the argument be sound,

[fol. 60] I do so although I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years,* relative to the First Amendment as applied to other kinds of legislation. The doctrine expressed in those opinions, as

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that the legislature may constitutionally provide punishment for the obscene because, anti-socially, it arouses sexual desires by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial —and thus not the subject of valid legislation which punishes the mailing of "filthy" matter. To avoid this seeming inconsistency, the statute should be interpreted as follows: The mailing of a "filthy" matter is a crime if that matter tends to induce acts by the recipient which will cause breaches of the peace. This interpretation is in line with *U. S.* v. *Limehouse*, 285 U. S. 424. There the Court affirmed the conviction of a defendant who had mailed letters to divers persons which, in "foul language," accused them of sexual immorality. Those letters thus were within the category of "fighting words"—i.e., insulting words or the like—which may constitutionally be made criminal precisely because they tend to provoke breaches of the peace. Where, however, "filthy" language appears in a book, or picture, and involves no insults to particular persons, there will be no such consequences.

If this were the correct interpretation of "filthy," then that part of the statute condemning the "filthy" would not apply to the acts of the defendant here, and the judge's instructions re "filthy" would have been erroneous.

But I think we need not here consider that interpretation since I agree with my colleagues that, for the reasons they state, assuming there was error, the defendant's deliberate acquiescence in the judge's instructions prevents him from now so asserting.

* "For nearly 130 years after its adoption, the First Amendment received scant attention from the Supreme Court"; Emerson, The Doctrine of Prior Restraint, 20 L & Cont. Problems (1955) 648, 652.

I understand it, may be summarized briefly as follows: Any statute authorizing governmental interference (whether by "prior restraint" or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite to a breach of the peace,** or with sufficient probability tend either to the over-throw of the government by illegal means or to some other overt anti-social conduct.†

[fol. 61] The troublesome aspect of the federal obscenity statute—as I shall try to explain in the Appendix to this opinion—is that (a) no one can now show that, with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults, and (b) that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires—not overt dangerous or anti-social conduct, either actual or probable.

Often the discussion of First Amendment exceptions has been couched in terms of a "clear and present danger." However, the meaning of that phrase has been somewhat watered down by *Dennis* v. *U. S.*, 341 U. S. 494. The test now involves probability: "In each case (courts) must ask," said Chief Justice Vinson in *Dennis*, "whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." It has been suggested that the test now is this: "The more serious, and threatened the evil, the lower the required degree of probability." * It would seem to follow that the less clear the danger, the more imminent must it be. At any

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** See, e.g., *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572.

† The judicial enforcement of private rights—as in suits, e.g., for defamation, injury to business, fraud, or invasion of privacy—comes within the exception.

* Lockhart and McClure, Obscenity and The Constitution, 38 Minn. L. Rev. (1954) 295, 357; *cf.* Kalven, The Law of Defamation and the First Amendment, in (University of Chicago) Conference on The Arts, Publishing and the Law (1952) 3, 12.

rate, it would seem that (1) the danger or evil must be clear (i.e., identifiable) and substantial, and (2) that, since the statute renders words punishable, it is invalid unless those words tend, with a fairly high degree of probability, to incite to overt conduct which is obviously harmful. For, under the First Amendment, lawless or anti-social "acts are the main thing. Speech is not punishable for its own sake, but only because of its connection with those * * * acts * * * But more than a remote connection is neces- [fol. 62] sary * * * " * See, e.g., *Communications Ass'n* v. *Douds*, 339 U. S. 382, 398, as to "the right of the public to be protected from *evils of conduct*, even though the First Amendment rights of persons or groups are thereby in some manner infringed." (Emphasis added.)

As I read the Supreme Court's opinions, the government, in defending the constitutionality of a statute which curbs free expression, may not rely on the usual "presumption of validity." No matter how one may articulate the reasoning, it is now accepted doctrine that, when legislation affects free speech or free press, the government must show that the legislation comes within one of the exceptions described above. See, e.g., *Dennis* v. *U. S.*, 341 U. S. 494; *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, 503. Moreover, when legislation affects free expression, the void-for-vagueness doctrine has a peculiar importance; and the obscenity statute is exquisitely vague. (See the Appendix, point 9.)

True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved in recent years. I base that statement on the following analysis of the cases:

In *Ex parte Jackson*, 96 U. S. 727 (1877), the Court held valid a statute relating to the mailing of letters, or circulars, concerning lotteries. Such letters or cir-

* Chafee, The Blessings of Liberty (1956) 69.

culars might well induce the addressees to engage in the overt conduct of engaging in lotteries. The Court, [fol. 63] only in passing, referred to the obscenity statute and said it, too, was valid.

In *Rosen* v. *U. S.*, 161 U. S. 29 (1896), the issue was solely the sufficiency of an indictment under the obscenity statute, not the validity of that legislation, and the Court did not discuss its validity.

In *Van Swearingen* v. *U. S.*, 161 U. S. 446 (1896), the Court reversed a conviction under the obscenity statute; it did not consider its constitutionality.

Dunlop v. *U. S.*, 165 U. S. 486 (1896), did not discuss the constitutionality of the statute; moreover, the opinion (at 501) shows that it dealt with advertisements soliciting improper sexual relations, i.e., with probable conduct, not with mere thoughts or desires.

In *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904), which did not involve the validity of any obscenity Act, the Court said in passing (p. 508) that its constitutionality "has never been attacked."

In *U. S.* v. *Limehouse*, 285 U. S. 424 (1932), the Court decided the correct interpretation of the word "filthy" in the statute, and did not consider the question of constitutionality. Moreover, there the defendant had mailed letters attacking the characters of the recipients who might well have been moved to conduct in breach of the peace.

In *Winters* v. *New York*, 333 U. S. 507 (1948), the Court held void for vagueness a state statute making it a crime to distribute publications consisting principally of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes. The Court said in passing (p. 510) that legislation subjecting obscene publications to governmental control is valid.

In *Doubleday* v. *New York*, 335 U. S. 848 (1948), the Court, by an evenly divided vote, without opinion af- [fol. 64] firmed a state court decision sustaining a state obscenity statute.

In *U. S.* v. *Alpers*, 338 U. S. 680 (1950), the Court construed the statute as amended, and affirmed a con-

viction thereunder, but did not consider its constitutionality.

In the following cases, where the validity of no obscenity statute was involved, the Court, in passing, referred to such legislation as valid: *Robertson* v. *Baldwin*, 165 U. S. 275, 281 (1897); *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931); *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1938); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572 (1942); *Beauharnais* v. *Illinois*, 343 U. S. 250, 266 (1952).

I agree with my colleagues that, since ours is an inferior court, we should not hold invalid a statute which our superior has thus often said is constitutional (albeit without any full discussion). Yet I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity which, up to now, I think the Supreme Court has not discussed in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation. Perhaps I have overlooked conceivable compelling contrary arguments. If so, maybe my Appendix will evoke them.

To preclude misunderstanding of my purpose in stirring doubts about this statute, I think it well to add the following:

(a) As many of the publications mailed by defendant offend my personal taste, I would not cross a street to obtain them for nothing; I happen not to be interested in [fol. 65] so-called "pornography"; and I think defendant's motives obnoxious. But if the statute were invalid, the merit of those publications would be irrelevant. *Winters* v. *New York*, 333 U. S. 507, 510. So, too, as to defendant's motives: "Although the defendant may be the worst of men * * * the rights of the best of men are secure only as the right of the vilest and most abhorrent are protected." *

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* Judge Cuthbert Pound dissenting in *People* v. *Gitlow*, 234 N. Y. 132, 158.

(b) It is most doubtful (as explained in the Appendix) whether anyone can now demonstrate that children's reading or looking at obscene matter has a probable causal relation to the children's anti-social conduct.** If, however, such a probable causal relation could be shown, there could be little doubt, I think, of the validity of a statute (if so worded as to avoid undue ambiguity) which specifically prohibits the distribution by mail of obscene publications for sale to young people. But discussion of such legislation is here irrelevant; since, to repeat, the existing federal statute is not thus restricted.

(c) Congress undoubtedly has wide power to protect public morals. But the First Amendment severely limits that power in the area of free speech and free press.

(d) It is argued that anti-obscenity legislation is valid because, at the time of the adoption of the First Amendment, obscenity as a common law crime. Relying (*inter alia*) on *Bridges* v. *California*, 341 U. S. 252, 264-265 and [fol. 66] *Grosjean* v. *American Press*, 297 U. S. 233, 248-249, I have tried in the Appendix to answer that argument.

(e) The First Amendment, of course, does not prevent any private body or group (including any Church) from instructing, or seeking to persuade, its adherents or others not to read or distribute obscene (or other) publications. That constitutional provision—safeguarding a principle indispensable in a true democracy—leaves unhampered all non-governmental means of molding public opinion about not reading literature which some think undesirable; and, in that respect, experience teaches that democratically exercised censorship by public opinion has far more potency, and is far less easily evaded, than censorship by govern-

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** The Appendix contains a discussion of the writings of those described by Judge Clark as persons "with competence in the premises." It tries to show (1) that the overwhelming majority of persons with such competence assert that there is no justification for the thesis that a demonstrable causal relation exists between reading or seeing the obscene and anti-social conduct, even of children, and (2) that the chief proponent of the opposite view with respect to the effect on children's conduct does not maintain the same as to adult conduct.

ment.* The incessant struggle to influence public opinion is of the very essence of the democratic process. A basic purpose of the First Amendment is to keep that struggle alive, by not permitting the dominant public opinion of the present to become embodied in legislation which will prevent the formation of a different dominant public opinion in the future.**

(f) At first glance it may seem almost frivolous to raise any question about the constitutionality of the obscenity statute at a time when many seemingly graver First Amendment problems confront the courts. But (for reasons stated in more detail in the Appendix) governmental [fol. 67] censorship of writings, merely because they may stimulate, in the reader, sexual thoughts the legislature deems undesirable, has more serious implications than appear at first glance: We have been warned by eminent thinkers of the easy path from any apparently mild governmental control of what adult citizens may read to governmental control of adult's political and religious reading. John Milton, Thomas Jefferson, James Madison, J. S. Mill and Toequeville have pointed out that any paternalistic guardianship by government of the thoughts of grown-up citizens enervates their spirit, keeps them immature, all too ready to adopt towards government officers the attitude that, in general, "Papa knows best." If the government possesses the power to censor publications which arouse

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* Public opinion, by influencing social attitudes, may create a convention, with no governmental "sanction" behind it, far more coercive than any statute. *Cf.* Holmes, Codes and The Arrangement of the Law, 2 Am. L. Rev. (1870) 4, 5.

Notably is this true of conventions as to obscenity: La Barre, Obscenity: An Anthropological Appraisal, 20 L & Con. Problems (1955) 533.

** The results of current public opinion may not always be happy. But our democracy accepts the postulate that, in the long run, the struggle to sway public opinion will produce the wisest policies. For further discussion of this theme, see the Appendix.

sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds? And even if we confine attention to official censorship of publications tending to stimulate sexual thoughts, it should be asked why, at any moment, that censorship cannot be extended to advertisements and true reports or photographs, in our daily press, which, fully as much, may stimulate such thoughts?

(g) Assuming, *arguendo*, that a statute aims at an altogether desirable end, nevertheless its desirability does not render it constitutional. As the Supreme Court has said, "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislatures of good purpose to promote it without thought of the serious break it will make in the ark of our covenant. * * *"*

In a concurring opinion in *Roth* v. *Goldman*, 172 F. 2d 788, 790 (1948), I voiced puzzlement about the constitution-
[fol. 68] ality of administrative prior restraint of obscene books. I then had little doubt about the validity of a purely punitive obscenity statute. But the next year, in *Commonwealth* v. *Gordon*, 6 Pa. C & D 101 (1949), Judge Curtis Bok, one of America's most reflective judges, directly attacked the validity of any such punitive legislation. His brilliant opinion, which states arguments that (so far as I know) have never been answered, nudged me into the skeptical views contained in this opinion and the Appendix.

[fol. 69] APPENDIX

As a judge of an inferior court, I am constrained by opinions of the Supreme Court concerning the obscenity statute to hold that legislation valid. Since, however, I think (as indicated in the foregoing) that none of those opinions has carefully canvassed the problem in the light of the Supreme Court's interpretation of the First Amendment, especially as expressed by the Court in recent years, I deem it not improper to set forth, in the following,

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* The Child Labor Tax Case, 259 U. S. 20, 37.

factors which I think deserve consideration in passing on the constitutionality of that statute.

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Benjamin Franklin, in 1776 unanimously designated Postmaster General by the First Continental Congress, is appropriately known as the "father of the Post Office." Among his published writings are two[1]—*Letter of Advice to Young Men on the Proper Choosing of a Mistress* and *The Speech of Polly Baker*—which a jury could reasonably find "obscene," according to the judge's instructions in the case at bar. On that basis, if tomorrow a man were to send those works of Franklin through the mails, he would be subject to prosecution and (if the jury found him guilty) to punishment under the federal obscenity statute.[2]

That fact would surely have astonished Jefferson, who extolled Franklin as an American genius,[3] called him "venerable and beloved" of his countrymen,[4] and wrote approv- [fol. 70] ingly of Franklin's *Polly Baker*.[5] No less would it have astonished Madison, also an admirer of Franklin (whom he described as a man whose "genius" was "an ornament of human nature") [5a] and himself given to telling

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[1] See Van Doren, Benjamin Franklin (1938) 150-151, 153-154.

Franklin's *Letter to The Academy of Brussels* (see Van Doren, 151-152) might be considered "filthy."

[2] 18 U. S. C. Section 1461.

[3] Jefferson, Notes on the State of Virginia (1781-1785), Query VI; See Padover, The Complete Jefferson (1943) 567 at 612.

[4] Jefferson, Autobiography (1821); See Padover, *loc. cit.*, 1119 at 1193.

[5] Jefferson, Anecdotes of Franklin (1818); see Padover, *loc. cit.*, 892 at 893.

[5a] On Franklin's death, Madison offered the following resolution which the House of Representatives unanimously adopted: "The House being informed of the decease of Benjamin Franklin, a citizen whose genius was not more of an ornament of human nature than his various exertions of it have been to science, to freedom and to his country, do

"Rabelaisian anecdotes."[6] Nor was the taste of these men unique in the American Colonies: "Many a library of a colonial planter in Virginia or a colonial intellectual in New England boasted copies of Tom Jones, Tristram Shandy, Ovid's Art of Love, and Rabelais. * * * "[7]

As, with Jefferson's encouragement, Madison, in the first session of Congress, introduced what became the First Amendment, it seems doubtful that the constitutional guaranty of free speech and free press could have been intended [fol. 71] to allow Congress validly to enact the "obscenity" Act. That doubt receives reinforcement from the following:

In 1799, eight years after the adoption of the First Amendment, Madison, in an Address to the General Assembly of Virginia,[8] said that the "truth of opinion" ought not to be subject to "imprisonment, to be inflicted by those of a different opinion"; he there also asserted that it would sub-

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resolve, as a mark of veneration due to his memory, that the members wear the customary badge of mourning for one month." Brant, James Madison, Father of the Constitution (1950) 309; Annals, April 22, 1790.

[6] Padover, The Complete Madison (1953) 8-9.

George Washington, who knew Franklin well, treasured a gold-headed cane given him by Franklin. See Padover, The Washington Papers (1955) 112.

See Judge Bok, in *Commonwealth* v. *Gordon*, 66 Pa. D & C 101, 120-121: "One need only recall that the father of the post office, Benjamin Franklin, wrote and presumably mailed his letter of Advice to Young Men on the Proper Choosing of a Mistress; that Thomas Jefferson worried about the students at his new University of Virginia having a respectable brothel; that Alexander Hamilton's adultery while holding public office created no great scandal * * * "

[7] Ernst and Seagle, To The Pure (1928) 108.

Everyone interested in obscenity legislation owes a deep debt to many writings on the subject by Morris Ernst. For such an acknowledgment, see Acknowledgments in Blanshard, The Right to Read (1955).

[8] See Padover, The Complete Madison (1953) 295-296.

vert the First Amendment [9] to make a "distinction between the freedom and the licentiousness of the press." Previously, in 1792, he wrote that "a man has property in his opinions and free communication of them," and that a government which "violates the property which individuals have in their opinion * * * is not a pattern for the United States." [10] Jefferson's proposed Constitution for Virginia (1776) provided: "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action." [11] In his Second Inaugural Address (1805), he said: "No inference is here intended that the laws provided by the State against false and defamatory publications should not be enforced * * *. The press, confined to truth, needs no other restraint * * *; and no other definite line can be drawn between the inestimable liberty of the press and demoralizing licentiousness. If there still be improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion."

The broad phrase in the First Amendment, prohibiting legislation abridging "freedom of speech or of the press," includes the right to speak and write freely for the public [fol. 72] concerning any subject. As the Amendment specifically refers "to the free exercise of religion" and to the right "of the people to assemble" and to "petition the government for a redress of grievances," it specifically includes the right freely to speak to and write for the public concerning government and religion; but it does not limit this right to those topics. Accordingly, the views of Jefferson and Madison about the freedom to speak and write concerning religion are relevant to a consideration of the constitutional freedom in respect of all other subjects. Consider, then, what those men said about freedom of religious discussion: Madison, in 1799, denouncing the distinction "between the freedom and the licentiousness of the press" said, "By its help, the judge as to what is licen-

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[9] Madison referred to the "Third Amendment," but the context shows he meant the First.

[10] See Padover, The Complete Madison (1953) 267, 268, 269.

[11] Padover, The Complete Jefferson (1943) 109.

tious may escape through any constitutional restriction," and added, "Under it, Congress might denominate a religion to be heretical and licentious, and proceed to its suppression * * * Remember * * * that it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion * * *"[12] Jefferson, in 1798, quoting the First Amendment, said it guarded "in the same sentence, and under the same words, the freedom of religion, of speech, and of the press; insomuch, that whatever violates either, throws down the sanctuary which covers the others."[13] In 1814, he wrote in a letter, "I am really mortified to be told that in the United States of America, a fact like this (the sale of a book) can become a subject of inquiry, and of criminal inquiry too, as an offense against religion; that (such) a question can be carried before the civil magistrate. Is this then our freedom of religion? And are we to have a censor whose imprimatur shall say what books may be sold and what we may buy? * * * Whose [fol. 73] foot is to be the measure to which ours are all to be cut or stretched?"[14]

Those utterances high-light this fact: Freedom to speak publicly and to publish has, as its inevitable and important correlative, the private rights to hear, to read, and to think and to feel about what one hears and reads. The First Amendment protects those private rights of hearers and readers.

We should not forget that, prompted by Jefferson,[15] Madison (who at one time had doubted the wisdom of a Bill of Rights)[16] when he urged in Congress the enactment of what became the first ten Amendments, declared, "If they are incorporated into the Constitution, independent

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[12] Madison, Address to the General Assembly of Virginia, 1799; see Padover, The Complete Madison (1953) 295.

[13] See Padover, The Complete Jefferson (1943) 139.

[14] See Padover, The Complete Jefferson (1943) 889.

[15] Jefferson's Letter to Madison (1789); Padover, The Complete Jefferson (1943) 123-125. See also Brant, James Madison, Father of the Constitution (1950) 267.

[1] The Federalist No. 84; Cahn, The Firstness of the First Amendment, 65 Yale L. J. (1956) 464.

tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable barrier against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[17] In short, the Bill of Rights, including the First Amendment, was not designed merely as a set of admonitions to the legislature and the executive; its provisions were to be enforced by the courts.

Judicial enforcement necessarily entails judicial interpretation. The question therefore arises whether the courts, in enforcing the First Amendment, should interpret it in accord with the views prevalent among those who [fol. 74] sponsored and adopted it or in accord with subsequently developed views which would sanction legislation more restrictive of free speech and free press.

So the following becomes pertinent: Some of those who in the 20th Century endorse legislation suppressing "obscene" literature have an attitude towards freedom of expression which does not match that of the framers of the First Amendment (adopted at the end of the 18th Century) but does stem from an attitude, towards writings dealing with sex, which arose decades later, in the mid-19th Century, and is therefore labelled—doubtless too sweepingly—"Victorian." It was a dogma of "Victorian morality" that sexual misbehavior would be encouraged if one were to "acknowledge its existence or at any rate to present it vividly enough to form a life-like image of it in the reader's mind"; this morality rested on a "faith that you could best conquer evil by shutting your eyes to its existence,"[18] and on a kind word of magic.[19] The demands at that time for

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[17] Madison, Writings (Hunt ed.) V, 385; Corwin, Liberty Against Government (1948) 58-59; Cahn, The Firstness of the First Amendment, 64 Yale L. J. (1956) 464, 468.

[18] Wingfield-Stratford, Those Earnest Victorians (1930) 151.

[19] See Kaplan, Obscenity as an Esthetic Category, 20 Law & Contemp. Problems (1955) 544, 550: "In many cultures,

"decency" in published words did not comport with the actual sexual conduct of many of those who made those demands: "The Victorians, as a general rule, managed to conceal the 'coarser' side of their lives so thoroughly under a mask of respectability that we often fail to realize how 'coarse' it really was * * * Could we have recourse to the vast unwritten literature of bawdry, we should be able to form a more veracious notion of life as it (then) really was." The respectables of those days often "with unblush-[fol. 75] ing license," held "high revels" in "night houses."[20] Thanks to them, Mrs. Warren's profession flourished, but it was considered sinful to talk about it in books.[21] Pretty obviously, those "Victorians" did not suppress obscene books in the belief that the reading of those books induced the very sexual behavior which the suppressors themselves practiced. Such a prudish and purely verbal moral code, at odds (more or less hypocritically) with the the actual conduct of its adherents[22] was (as we have seen) not the moral code of those who framed the First Amendment.[23] One would suppose, then, that the courts should interpret and enforce that Amendment according to the

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obscenity has an important part in magical rituals. In our own, its magical character is betrayed in the puritan's supposition that words alone can work evil, and that evil will be averted if only the words are not uttered."

[20] Wingfield-Stratford, *loc. cit.* 296-297.

[21] Paradoxically, this attitude apparently tends to "create" obscenity. For the foundation of obscenity seems to be secrecy and shame: "The secret becomes shameful because of its secrecy." Kaplan, Obscenity As An Esthetic Category, 20 Law & Contemp. Problems (1955) 544, 556.

[22] To be sure, every society has "pretend-rules" (moral and legal) which it publicly voices but does not enforce. Indeed, a gap necessarily exists between a society's ideals, if at all exalted, and its practices. But the extent of the gap is significant. See, *e.g.*, Frank, Lawlessness, Encyc. of Soc. Sciences (1932); *cf.* Frank, Preface to Kahn, a Court for Children (1953).

[23] It is of interest that not until the Tariff Act of 1824 did Congress enact any legislation relative to obscenity.

views of those framers, not according to the later "Victorian" code.[24]

The "founding fathers" did not accept the common law concerning freedom of expression.

It has been argued that the federal obscenity statute is valid because obscenity was a common law crime at the time of the adoption of the First Amendment. Quite aside from [fol. 76] the fact that, previous to the Amendment, there had been scant recognition of this crime, the short answer seems to be that the framers of the Amendment knowingly and deliberately intended to depart from the English common law as to freedom of speech and freedom of the press. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249; *Bridges* v. *California*, 314 U. S. 252, 264-265;[24a] Patterson,

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[24] For discussion of the suggestion that many constitutional provisions provide merely minimum safeguards which may properly be enlarged—not diminished—to meet newly emerging needs and policies, see Supreme Court and Supreme Law (Cahn ed. 1954) 59-64.

[24a] In *Bridges* v. *California*, 314 U. S. 252, 264-265, the Court said: "In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' Schofield, Freedom of the Press in the United States, 9 Publications Amer. Sociol. Soc., 67, 76. More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment said: 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body (Parliament), the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the

[fol. 77] Free Speech and a Free Press (1939) 101-102, 124-125, 128; Schofield, 2 Constitutional Law and Equity (1921) 521-525.

Of course, the legislature has wide power to protect what it considers public morals. But the First Amendment severly circumscribes that power (and all other legislative powers) in the area of speech and free press.

British Constitution.' 1 Annals of Congress 1789-1790, 434. And Madison elsewhere wrote that 'the state of the press * * * under the common law cannot * * * be the standard of its freedom in the United States.' VI Writings of James Madison 1790-1802, 387. There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

In *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249, the Court said: "It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship for this abuse had then permanently disappeared from English practice. * * * Undoubtedly, the range of a constitutional provision

Subsequent punishment as, practically, prior restraint

For a long time, much was made of the distinction between a statute calling for "prior restraint" and one providing subsequent criminal punishment;[25] the former alone, [fol. 78] it was once said, raised any question of constitu-

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phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons when-ever they exist. *Cf. Continental Illinois Nat. Bank v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 668-669. And, obviously, it is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-277; *Waring v. Clarke*, 5 How. 441, 454-457; *Powell v. Alabama*, *supra*, pp. 60-65. In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists. * * *"

[25] Blackstone, most influentially, made this distinction; 4 Blackstone, Commentary, 151-162. His condonation of punishment reflected the views of his patron, Lord Mansfield, who, an opponent of a free press, took an active part in punishing published criticism of the government.

But men like Jefferson and James Wilson abhorred the Tory political views of Blackstone and Mansfield, both of whom had ranked high in the opposition to the American Colonists. Jefferson wrote to Madison of "the horrid Mansfieldism of Blackstone which had caused many young American lawyers to slide into Toryism." Jefferson applauded Tucker's "republicanized" edition of Blackstone published in 1803. See Frank, A Sketch of An Influence, in the volume Interpretations of Modern Legal Philosophers (1947) 189, especially 231; see also 191, 196-198, 205, 207, 210, 215-217. For James Wilson's denunciation of Blackstone's political attitudes, see, *e.g.*, Wilson's opinion in *Chisholm v. Georgia*, 2 Dall. 419, 453, 458, 462.

tionality *vis-à-vis* the First Amendment.[26] Although it may still be true that more is required to justify legislation providing "preventive" than "punitive" censorship,[27] this distinction has been substantially eroded. See, e.g., *Dennis* v. *U. S.*, 341 U. S. 494; *Schenck* v. *U. S.*, 249 U. S. 47; *DeJonge* v. *Oregon*, 299 U. S. 353; *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 note 3. See also Hale, Freedom Through Law (1952) 257-265; Emerson The Doctrine of Prior Restraint, 20 Law & Contemp. Problems (1955) 648 (a thought-stirring discussion of the problem); Kalven, loc. cit. at 8-10, 13. (For further discussion of this theme, see *infra*.)

The statute, as judicially interpreted, authorizes punishment for inducing mere thoughts, and feelings, or desires

For a time, American courts adopted the test of obscenity contrived in 1868 by Cockburn, *L.J.*, in *Queen* v. *Hicklin*, L.R. 3 Q.B. 360: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall." He added that the book there in question "would suggest * * * thoughts of a most impure and libidinous character."

[fol. 79] The test in most federal courts has changed: They do not now speak of the thoughts of "those whose minds are open to * * * immoral influences" but, instead, of the thoughts of average adult normal men and women, determining what these thoughts are, not by proof at the trial, but by the standard of "the average conscience of the time," the current "social sense of what is right." See e.g., *U. S.* v. *Kennerly*, 209 F. 119, 121; *U. S.* v. *Levine*, 83 F. 2d 156, 157; *Parmelee* v. *U. S.*, 113 F. 2d 729 (App. D. C.).

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[26] See Holmes, *J.* in *Patterson* v. *Colorado*, 205 U. S. 454 (1907) citing Blackstone. But compare his subsequent dissenting opinion in *Abrams* v. *U. S.*, 250 U. S. 616, 624 (1919) which abandons Blackstone's dichotomy.

[27] For these phrases, see Lasswell, Censorship, 3 Ency. of Soc. Sc. (1930) 290, 291.

Yet the courts still define obscenity in terms of the assumed average normal adult reader's sexual thoughts or desires or impulses, without reference to any relation between those "subjective" reactions and his subsequent conduct. The judicial opinions use such key phrases as this: "suggesting lewd thoughts and exciting sensual desires";[28] "arouse the salacity of the reader,"[29] "allowing or implanting * * * obscene, lewd or lascivious thoughts or desires,"[30] "arouse sexual desires."[30a] The judge's charge in the instant case reads accordingly: "It must tend to stir sexual impulses and lead to sexually impure thoughts." Thus the statute, as the courts construe it, appears to provide criminal punishment for inducing no more than thoughts, feelings, desires.

No adequate knowledge is available concerning the effects on the conduct of normal adults of reading or seeing the "obscene."

Suppose we assume, *arguendo*, that sexual thoughts or feelings stirred by the "obscene," probably will often issue [fol. 80] into overt conduct. Still it does not at all follow that that conduct will be anti-social. For no sane person can believe it socially harmful if sexual desires lead to normal sexual behavior since without such behavior the human race would soon disappear.[31]

Doubtless, Congress could validly provide punishment for mailing any publications if there were some moderately substantial reliable data showing that reading or seeing

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[28] *U. S.* v. *Dennett*, 39 F. 2d 564, 568 (C. A. 2).

[29] *U. S.* v. *Levine*, 83 F. 2d 156, 158 (C. A. 2).

[30] *Burstein* v. *U. S.*, 178 F. 2d 665, 667 (C. A. 9).

[30a] *American Civil Liberties Union* v. *Chicago*, 3 Ill. (2d) 334, 121 N. E. (2d) 585.

[31] *Cf.* the opinion of Mr. Justice Codd in *Integrated Press* v. *The Postmaster General*, as reported in Herbert, Codd's Last Case (1952) 14, 16: "Nor is the Court much impressed by the contention that the frequent contemplation of young ladies in bathing dresses must tend to the moral corruption of the community. On the contrary, these ubiquitous exhibitions have so diminished what was left of the

those publications probably conduces to seriously harmful sexual conduct on the part of normal adult human beings. But we have no such data.

Suppose it argued that whatever excites sexual longings might *possibly* produce sexual misconduct. That cannot suffice: Notoriously, perfumes sometimes act as aphrodisiacs, yet one will suggest that therefore Congress may constitutionally legislate punishment for mailing perfumes. In truth, the stimuli to irregular sexual conduct, by normal men and woman, may be almost anything—the odor of carnations or cheese, the sight of a cane or a candle or a shoe, the touch of silk or a gunny-sack. For all anyone now knows, stimuli of that sort may be far more provocative of such misconduct than reading obscene books or seeing obscene pictures. Said John Milton, "Evil manners are as perfectly learnt, without books, a thousand other ways that cannot be stopped."

[fol. 81] *Effect of "obscenity" on adult conduct*

To date there exists, I think, no thorough-going studies by competent persons which justifies the conclusion that normal adults' reading or seeing of the "obscene" probably induces anti-social conduct. Such studies do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that "obscenity" represents a ponderable causal factor in sexually deviant adult behavior. "Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect

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mystery of womanhood that they might easily be condemned upon another ground of public policy, in that they tended to destroy the natural fascination of the female, so that the attention of the male population was diverted from thoughts of marriage to cricket, darts, motor-bicycling and other occupations which do nothing to arrest the decline of the population."

of sex literature upon sexual behavior." [32] What little competent research has been done, points definitely in a direction precisely opposite to that assumption.

Alpert reports [33] that, when, in the 1920s, 409 women college graduates were asked to state in writing what things stimulated them sexually, they answered thus: 218 said "Man"; 95 said books; 40 said drama; 29 said dancing; 18 said pictures; 9 said music. Of those who replied "that the source of their sex information came from books, not one specified a 'dirty' book as the source. Instead, the books listed were: The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal diseases, medical books, and Motley's Rise of the Dutch Republic." Macaulay, replying to advocates of the suppression of obscene books, said: "We find it difficult to believe that in a world so full of temptations as this, any [fol. 82] gentleman whose life would have been virtuous, if he had not read Aristophanes or Juvenal, will be vicious by reading them." Echoing Macaulay, "Jimmy" Walker remarked that he had never heard of a woman seduced by a book. New Mexico has never had an obscenity statute; there is no evidence that, in that state, sexual misconduct is proportionately greater than elsewhere.

Effect on conduct of young people

Most federal courts (as above noted) now hold that the test of obscenity is the effect on the "mind" of the average normal adult, that effect being determined by the "average conscience of the time," the current "sense of what is right"; and that the statute does not intend "to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few": *U. S.* v. *Kennerley*, 209 F. 120, 121.

However, there is much pressure for legislation, designed to prevent juvenile delinquency, which will single out children, i.e., will prohibit the sale to young persons of "ob-

[32] Lockhart and McClure, Obscenity and The Courts, 20 L. & Contemp. P. (1955) 587, 595.

[33] See Alpert, Judicial Censorship and The Press, 52 Harv. L. Rev. (1938) 40, 72.

scenity" or other designated matter. That problem does not present itself here, since the federal statute is not thus limited. The trial judge in his charge in the instant case told the jury that the "test" under that statute is not the effect of the mailed matter on "those comprising a particular segment of the community, the "young" or "the immature"; and see *U. S.* v. *Levine*, 83 F. 2d 156, 157 (C. A. 2).

Therefore a discussion of such a children's protective statute is irrelevant here. But, since Judge Clark does discuss the alleged linkage of obscenity to juvenile delinquency, and since it may perhaps be thought that it has some bearing on the question of the effect of obscenity on adult conduct, I too shall discuss it.

[fol. 83] The following is a recent summary of studies of that subject: "(1) Scientific[33a] studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other nonactive entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 400 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any were read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in

[33a] I, for one, deplore the use of the word "scientific" as applied to social studies. See, *e.g.*, Frank, 4 J. of Public Law (1955) 8.

an exhaustive study of causes, there is good reason for serious doubts concerning the basic hypothesis on which obscenity censorship is dependent. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the [fol. 84] community sex standards. * * * And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society." [34]

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[34] Novick, Superintendent of the New York Training School for Girls, writes: "In the public eye today juvenile delinquency is alternately the direct result of progressive education, horror comics, T. V. programs, and other pet peeves of our present society. * * * This is not a new phenomenon. Each generation of adults has been concerned about the behavior of its children and has looked for a scapegoat on which to place the blame for its delinquency. At the same time, adults have always sought a panacea which would cure the problem. It is sufficient to note that delinquency has always risen during periods of stress and strain, and the era in which we are living is no exception * * * Neither do restrictive measures such as * * * censorship of reading matter * * * prevent delinquency. They merely have an effect upon the manner in which the delinquency will be expressed." Novick, Integrating the Delinquent and His Community, 20 Fed. Probation, 38, 40 (1956).

Charles Lamb (whose concern with children he manifested in his *Tales From Shakespeare*) had no belief that uncensored reading harmed children: In his *Essays of Elia* he wrote of the education of his cousin Bridget, "She was tumbled early into a spacious closet of good old English reading" (which included Elizabethen and Restoration dramas and 18th century novels) "without much selection or prohibition and browsed at will upon that fair and whole-

[fol. 85] Judge Clark, however, speaks of "the strongly held views of those with competence in the premises as to the very direct connection" of obscenity "with the development of juvenile delinquency." In support of this statement, he cites and quotes from a recent opinion of the New York Court of Appeals and an article by Judge Vanderbilt, which in turn, cite the writings of persons thus described by Judge Clark as "those with competence in the premises." One of the cited writings is a report, by Dr. Jahoda and associates, entitled The Impact of Literature:

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some pasturage. Had I twenty girls, they should be brought up exactly in this fashion."

Judge Curtis Bok, perhaps remembering Lamb's remarks, said of the publications before him in *Commonwealth* v. *Gordon*, 66 P. & D. 101 (1949): "It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every day, young and old. Our daughters must live in the world and decide what sort of women they are to be, and we should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance. If that choice be made in the open sunlight, it is more apt than when made in shadow to fall on the side of honorable behavior."

Watson writes similarly: "What innocent children most need is not a sterile environment from which all evidence of

A Psychological Discussion of Some Assumptions in the Censorship Debate (1954).[35] I have read this report (which is a careful survey of all available studies and psychological theories). I think it expresses an attitude quite contrary to that indicated by Judge Clark. In order to avoid any possible bias in my interpretation of that report, I thought it [fol. 86] well to ask Dr. Jahoda to write her own summary of it, which, with her permission, I shall quote. (In doing so, I am following the example of Mr. Justice Jackson who, in *Fed. Trade Commission* v. *Rubberoid*, 343 U. S. 470, 485, acknowledged that he relied on "an unpublished treatise," i.e., one not available to the parties. If that practice is proper, I think it similarly proper to quote the author's unpublished interpretation of a published treatise.) Dr. Jahoda's summary reads as follows:

"Persons who argue for increased censorship of printed matter often operate on the assumption that reading about sexual matters or about violence and brutality leads to anti-social actions, particularly to juvenile delinquency. An

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* * * lust * * * has been removed, but help in interpreting the evil which is an inescapable part of life. Home, school and church should cooperate not to create an artificial hot-house insulation for life's realities but to enable children to respond, "Ah, yes: I understand!" Most children in middle class homes alarm their parents by spells in which they overdo imaginative violence, sex talk, worry about death, listening to cowboy programs, reading inane comics, exchanging dirty stories, and most of them in time, with or without adult counsel, will work their way through to better standards of taste. Protection by censorship might leave such children weaker and more susceptible; some of these childhood interests, like measles, contribute to a later life of useful immunity." Watson, Some Effects on Censorship upon Society, in 5 Social Meaning of Legal Concepts (1953) 73, 83-85.

Said Milton: "They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin." A renowned sinner declared that he "could resist everything but temptation."

[35] Cited in a passage in *Brown* v. *Kingsley Books, Inc.*, 1 N. Y. (2d) 639, quoted by Judge Clark.

examination of the pertinent psychological literature has led to the following conclusions:

"1. There exists no research evidence either to prove or to disprove this assumption definitively.

"2. In the absence of scientific proof two lines of psychological approach to the examination of the assumption are possible: (a) a review of what is known on the causes of juvenile delinquency; and (b) review of what is known about the effect of literature on the mind of the reader.

"3. In the vast research literature on the causes of juvenile delinquency there is no evidence to justify the assumption that reading about sexual matters or about violence leads to delinquent acts. Experts on juvenile delinquency agree that it has no single cause. Most of them regard early childhood events, which precede the reading age, as a necessary condition for later delinquency. At a later age, the nature of personal relations is assumed to have much greater power in determining a delinquent career than the vicarious experiences provided by reading matter. [fol. 87] Juvenile delinquents as a group read less, and less easily, than non-delinquents. Individual instances are reported in which so-called 'good' books allegedly influenced a delinquent in the manner in which 'bad' books are assumed to influence him.

"Where childhood experiences and subsequent events have combined to make delinquency psychologically likely, reading could have one of two effects: it could serve a trigger function releasing the criminal act or it could provide for a substitute outlet of aggression in fantasy, dispensing with the need for criminal action. There is no empirical evidence in either direction.

"4. With regard to the impact of literature on the mind of the reader, it must be pointed out that there is a vast overlap in content between all media of mass communication. The daily press, television, radio, movies, books and comics all present their share of so-called 'bad' material, some with great realism as reports of actual events, some in clearly fictionalized form. It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them. Some evidence suggests that the particular communications which arrest the attention of an

individual are in good part a matter of choice. As a rule, people do not expose themselves to everything that is offered, but only to what agrees with their inclinations.

"Children, who have often not yet crystallized their preferences and have more unspecific curiosity than many adults, are therefore perhaps more open to accidental influences from literature. This may present a danger to youngsters who are insecure or maladjusted who find in reading (of 'bad' books as well as of 'good' books) an escape from reality which they do not dare face. Needs which are not met in the real world are gratified in a fantasy world. It is likely, though not fully demonstrated, that excessive reading of comic books will intensify in [fol. 88] children those qualities which drove them to the comic book world to begin with: an inability to face the world, apathy, a belief that the individual is hopelessly impotent and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world.

"It should be noted that insofar as causal sequence is implied, insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to these potential effects. Unfortunately, perhaps, the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales might do much the same."

Most of the current discussion of the relation between children's reading and juvenile delinquency has to do with so-called "comic books" which center on violence (sometimes coupled with sex) rather than mere obscenity. Judge Vanderbilt, in an article from which Judge Clark quotes, cites Feder, Comic Book Regulation (University of California, Bureau of Public Administration, 1955 Legislative Problems No. 2).[36] Feder writes: "It has never been determined definitely whether or not comics portraying violence, crime and horror are a cause of juvenile delinquency."

Judge Vanderbilt, in the article from which Judge Clark quotes, also cites Wertham, Seduction of the Innocent (1954).[37] Dr. Wertham is the foremost proponent of the

[36] Vanderbilt, Impasse In Justice, Wash. U.L.Q. (1956): 267, 302.

[37] *Ibid.*

view that "comic books" do contribute to juvenile delinquency. The Jahoda Report takes issue with Dr. Wertham, who relies much on a variety of the *post-hoc-ergo-propter-hoc* variety of argument, i.e., youths who had read "comic books" became delinquents. The argument, at best, proves too much: Dr. Wertham points to the millions of young readers of such books; but only a fraction of these readers become delinquents. Many of the latter also chew gum, [fol. 89] drink coca-cola, and wear soft-soled shoes. Moreover, Dr. Wertham specifically says (p. 298) that he is little concerned with allegedly obscene publications designed for reading by adults, and (pp. 303, 316, 348) that the legislation which he advocates would do no more than forbid the sale or display of "comic books" to minors. Since, as previously noted, the federal obscenity statute is not so restricted, even Dr. Wertham's book does not support Judge Clark's position.

Maybe some day we will have enough reliable data to show that obscene books and pictures do tend to influence children's sexual conduct adversely. Then a federal statute could be enacted which would avoid constitutional defects by authorizing punishment for using the mails or interstate shipments in the sale of such books and pictures to children.[38]

It is, however, not at all clear that children would be ignorant, in any considerable measure, of obscenity, if no obscene publications ever came into their hands. Youngsters get a vast deal of education in sexual smut from companions of their own age.[39] A verbatim report of conversa-

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[38] Such a statute was long ago suggested. See Ernst and Seagle, To the Pure (1928) 277.

[39] Cf. *U. S. v. Dennett*, 9 F. 2d 564, 568 (C. A. 2).

Alpert (*loc. cit.* at 74) writes of the American Youth Commission study of the conditions and attitudes of young people in Maryland between the ages of sixteen and twenty-four, as reported in 1938: "For this study Maryland was deliberately picked as a 'typical' state, and, according to the Commission, the 13,528 young people personaly interviewed in Maryland can speak for the two hundred and fifty thousand young people in Maryland and the twenty-

tions among young teen-age boys (from average respectable [fol. 90] homes) will disclose their amazing proficiency in obscene language, learned from other boys.[40] Replying to the argument of the need for censorship to protect the young, Milton said: "Who shall regulate all the * * *, conversation of our youth * * * appoint what shall be discussed * * *" Most judges who reject that view are long past their youth and have probably forgotten the conversational ways of that period of life: "I remember when I was a little boy," said Mr. Dooley, "but I don't remember how I was a little boy."

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millions in the United States. 'The chief source of sex "education" for the youth of all ages and all religious groups was found to be the youth's contemporaries.' Sixty-six percent of the boys and forty percent of the girls reported that what they knew about sex was more or less limited to what their friends of their own age had told them. After 'contemporaries' and the youth's home, the source that is next in importance is the school, from which about 8 percent of the young people reported they had received most of their sex information. A few, about 4 percent, reported they owed most to books, while less than 1 percent asserted that they had acquired most of their information from movies. Exactly the same proportion specified the church as the chief source of their sex information. These statistical results are not offered as conclusive; but that they do more than cast doubt upon the assertion that 'immoral' books, corrupt and deprave must be admitted. These statistical results placed in the scale against the weight of the dogma upon which the law is founded lift the counterpane high. Add this: that 'evil manners' are as easily acquired without books as with books; that crowded slums, machine labor, barren lives, starved emotions, and unreasoning minds are far more dangerous to morals than any so-called obscene literature. True, this attack is tangential, but a social problem is here involved, and the weight of this approach should be felt." *Id.* at 74.

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[40] For such a report, slightly expurgated for adult readers, see Cleckley, The Mask of Sanity (1950) 135-137.

The obscenity statute and the reputable press.

Let it be assumed, for the sake of the argument, that contemplation of published matter dealing with sex has a significant impact on children's conduct. On that assumption, we cannot overlook the fact that our most reputable newspapers and periodicals carry advertisements and photographs displaying women in what decidedly are sexually alluring postures,[41] and at times emphasizing the [fol. 91] importance of "sex appeal." That women are there shown scantily clad, increases "the mystery and allure of the bodies that are hidden," writes an eminent psychiatrist. "A leg covered by a silk stocking is much more attractive than a naked one; a bosom pushed into shape by a brassiere is more alluring than the pendant realities."[42] Either, then, the statute must be sternly applied to prevent the mailing of many reputable newspapers and periodicals containing such ads and photographs, or else we must acknowledge that they have created a cultural atmosphere for children in which, at a maximum, only the most trifling additional effect can be imputed to children's perusal of the kind of matter mailed by the defendant.

The obscenity statute and the newspapers

Because of the contrary views of many competent persons, one may well be sceptical about Dr. Wertham's thesis. However, let us see what, logically, his crusade would do the daily press: After referring repeatedly to the descriptions, in "comic books" and other "mass media," of violence combined with sadistic sexual behavior, descriptions

[41] *Cf.* Larrabee, The Cultural Context of Sex Censorship, 20 L. & Contemp. Prob. (1955) 672, 684.

[42] Myerson, Speaking of Man (1950) 92. See also the well known chapter on clothes in Anatole France's Penguin Island.

Dr. Wertham discussing "comic books," makes much of the advertisements they carry. He speaks of their "breast ads," and also of their playing up of "glamour girls," their stress on the "sexy," their emphasis on women's "secondary sexual characteristics." Is not this also descriptive of the advertisements in our "best periodicals"?

which he says contribute to juvenile delinquency, he writes. "Juvenile delinquency reflects the social values current in a society. Both adults and children absorb these social values in their daily lives, * * * and also in *all the communications through the mass media* * * * Juvenile delinquency holds up a mirror to society * * * It is self-understood that such a pattern in a mass medium does not come from nothing * * * Comic books are not the disease, they [fol. 92] are only a symptom * * * The same social forces that made comic books make other social evils, and the same social forces that keep comic crime books keep the other social evils the way they are." (Emphasis added.)

Now the daily newspapers, especially those with immense circulations, constitute an important part of the "mass media"; and each copy of a newspaper sells for much less than a "comic book." Virtually all the descriptions of sex mingled with violence, which Dr. Wertham finds in the "comic books," can be found, often accompanied by gruesome photographs, in those daily journals. Even a newspaper which is considered unusually respectable, published prominently on its first page, on August 26, 1956, a true story of a "badly decomposed body" of a 24 year old woman school teacher, found in a clump of trees. The story reported that police had quoted a 29 year old salesman as saying that "he drove to the area" with the school teacher, that "the two had relations on the ground, and later got into an argument," after which he "struck her three times on the back of the head with a rock, and, leaving her there, drove away." One may suspect that such stories of sex and violence in the daily press have more impact on young readers than do those in the "comic books," since the daily press reports reality while the "comic books" largely confine themselves to avowed fiction or fantasy. Yet Dr. Wertham, and most others who propose legislation to curb the sale of "comic books" to children, propose that it should not extend to newspapers.[42a] Why not?

[42a] "No one would dare ask of a newspaper that it observe the same restraints that are constantly being demanded of * * * the comic book." Larrabee, The Cultural Context of Sex Censorship, 20 Law and Contemp. Problems (1955) 673, 679.

The question is relevant in reference to the application of the obscenity statute: Are our prosecutors ready to [fol. 93] prosecute reputable newspaper publishers under that Act? I think not. I do not at all urge such prosecutions. I do suggest that the invalidity of that statute has not been vigorously challenged because it has not been applied to important persons like those publishers but, instead, has been enforced principally against relatively inconspicuous men like the defendant here.

Da Capo: Available data seem wholly insufficient to show that the obscenity statutes comes within any exception to the First Amendment.

I repeat that, because that statute is not restricted to obscene publications mailed for sale to minors, its validity should be tested in terms of the evil effects of adult reading of obscenity on adult conduct.[43] With the present lack of evidence that publications probably have such effects, how can the government demonstrate sufficiently that the statute is within the narrow exceptions to the scope of the First Amendment? One would think that the mere possibility of a causal relation to misconduct ought surely not be enough. Even if Congress had made an express legislative finding of the probable evil influence, on adult conduct of adult reading or seeing obscene publications, the courts would not be bound by that finding, if it were not justified in fact. See, e.g., *Chastleton Corp. v. Sinclair*, 264 U. S. 543, where the Court (per Holmes, *J.*) said a statute (declaring the existence of an emergency) that "a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." And the Court there and elsewhere has held that the judiciary may use judicial notice in ascertaining the truth of such legislative declarations.[44]

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[43] See *U. S. v. Levine*, 83 F. 2d 156, 157 (C. A. 2) to the effect that "what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach."

[44] Cf. *United States v. Rumely*, 345 U. S. 41, 44.

[fol. 94] *If the obscenity statute is valid, why may Congress not validly provide punishment for mailing books which will provoke thoughts it considers undesirable about religion or politics?*

If the statute is valid, then, considering the foregoing, it would seem that its validity must rest on this ground: Congress, by statute, may constitutionally provide punishment for the mailing of books evoking mere thoughts or feelings about sex, if Congress considers them socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially harmful deeds. If that be correct, it is hard to understand why, similarly, Congress may not constitutionally provide punishment for such distribution of books evoking mere thoughts or feelings, about religion or politics, which Congress considers socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially dangerous deeds.

2. *The Judicial exception of the "classics"*

As I have said, I have no doubt the jury could reasonably find, beyond a reasonable doubt, that many of the publications mailed by defendant were obscene within the current judicial definition of the term as explained by the trial judge in his charge to the jury. But so, too, are a multitude of recognized works of art found in public libraries. Compare, for instance, the books which are exhibits in this case with Montaigne's Essay on *Some Lines of Virgil* or with Chaucer. Or consider the many nude pictures which the defendant transmitted through the mails, and then turn to the reproductions in the articles on painting and sculpture in the Encyclopedia Britannica (14th edition):[45] Some of

[45] See, *e.g.*, Vol. 17, p. 36, Plate 3, No. 4, reproducing Botticelli's "Birth of Venus"; p. 38, Plate VIII, No. 2, reproducing Titian's "Woman on a Couch"; Vol. 20, p. 202, Plate V, No. 8, reproducing Clodion's "Nymph and Satyr"; p. 204, Plate VI, reproducing Rodin's "The Kiss."

See *Parmelee* v. *U. S.*, 113 F. 2d 729, 734 and note 19 (App. D. C.).

[fol. 95] the latter are indistinguishably "obscene." Yet these Encyclopedia volumes are readily accessible to everyone, young or old, and, without let or hindrance, are frequently mailed to all parts of the country. Catalogues, of famous art museums, almost equally accessible and also often mailed, contain reproductions of paintings and sculpture, by great masters, no less "obscene."[46]

To the argument that such books (and such reproductions of famous paintings and works of sculpture) fall within the statutory ban, the courts have answered that they are "classics,"—books of "literary distinction" or works which have "an accepted place in the arts," including, so this court has held, Ovid's Art of Love and Boccacio's Decameron.[47] There is a "curious dilemma" involved in this answer that the statute condemns "only books which are dull and without merit," that in no event will the statute be applied to the "classics," i.e., books "of literary distinction."[48] The courts have not explained how they escape that dilemma, but instead seem to have gone to sleep (although rather uncomfortably) on its horns.

This dilemma would seem to show up the basic constitutional flaw in the statute. No one can reconcile the cur-[fol. 96] rently accepted test of obscenity with the immunity of such "classics" as e.g., Aristophanes' *Lysistrata*, Chaucer's, *Canterbury Tales*, Rabelais', *Gargantua and Pantagruel*, Shakespeare's *Venus and Adonis*, Fielding's,

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[46] See, *e.g.*, Masterpieces of Painting From The National Gallery of Art (Cairns and Walker ed. 144) 68, 72, 114; Catalogue of Pictures Collected by Yale Alumni (1956) 3, 15, 55, 134, 137, 195.

[47] See, *e.g.*, *U. S.* v. *Levine*, 83 F. 2d 156, 157 (C. A. 2); *U. S.* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (C. A. 2); *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2).

[48] See *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2).

No one can argue with a straight face (1) that reading an obscene "classic" in a library has less harmful effects or (2) that, as the "classics" often are published in expensive volumes, they usually affect only persons who have large incomes, and that such persons' right to read is peculiarly privileged.

Tom Jones, or Balzac's *Droll Stories*. For such "obscene" writings, just because of their great artistry and charm, will presumably have far greater influence on readers than dull inartistic writings.

It will not do to differentiate a "classic," published in the past, on the ground that it comported with the average moral attitudes at the time and place of its original publication. Often this was not true. It was not true, for instance, of Balzac's Droll Stories,[49] a "classic" now freely circulated by many public libraries, and which therefore must have been transported by mail (or in interstate commerce). More to the point, if the issue is whether a book meets the American common conscience of the present time, the question is how "average" Americans now regard the book, not how it was regarded when first published, here or abroad. Why should the age of an "obscene" book be relevant? After how many years—25 or 50 or 100—does such a writing qualify as a "classic"?

The truth is that the courts have excepted the "classics" from the federal obscenity statute, since otherwise most Americans would be deprived of access to many masterpieces of literature and the pictorial arts, and a statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the First Amendment.

This exception—nowhere to be found in the statute[50]—is a judge-made device invented to avoid that absurdity. The [fol. 97] fact that the judges have felt the necessity of seeking that avoidance, serves to suggest forcibly that the statute, in its attempt to control what our citizens may read and see, violates the First Amendment. For no one can rationally justify the judge-made exception. The contention would scarcely pass as rational that the "classics" will be

[49] See discussion in *Roth* v. *Goldman*, 172 F. 2d at 797 (C. A. 2).

[50] The importation statute relating to obscenity, 19 U. S. C. 1305, does make an explicit exception of the "so-called classics or books of recognized and established literary * * * merit," but only if they are "imported for non-commercial purposes"; if so, the Secretary of the Treasury has discretion to admit them.

read or seen solely by an intellectual or artistic elite; for, even ignoring the snobbish, undemocratic, nature of this contention; there is no evidence that that elite has a moral fortitude (an immunity from moral corruption) superior to that of the "masses." And if the exception, to make it rational, were taken as meaning that a contemporary book is exempt if it equates in "literary distinction" with the "classics," the result would be amazing: Judges would have to serve as literary critics; jurisprudence would merge with aesthetics; authors and publishers would consult the legal digests for legal-artistic precedents; we would some day have a Legal Restatement of the Canons of Literary Taste.

The exception of the "classics" is therefore irrational. Consequently, it would seem that we should interpret the statute rationally—i.e., without that exception. If, however, the exception, as an exception, is irrational, then it would appear that, to render the statute valid, the standard applied to the "classics" should be applied to all books and pictures. The result would be that, in order to be constitutional, the statute must be wholly inefficacious.

3. How censorship under the statute actually operates

(a) Prosecutors, as censors, actually exercise prior restraint.

Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically [fol. 98] fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive. If the definition of obscenity had a limited and fairly well known scope, that fear might deter restricted sorts of publications only. But on account of the extremely vague judicial definition of the obscene,[51] a person threatened with prosecution if he mails (or otherwise sends in interstate commerce)[52] almost any book which

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[51] See *infra* for further discussion of that vagueness.

[52] As to interstate transportation, see 18 U. S. C. Section 1462 which contains substantially the same provisions as 18 U. S. C. Section 1461.

deals in an unconventional, unorthodox, manner with sex,[53] may well apprehend that, should the threat be carried out, he will be punished. As a result, each prosecutor become a literary censor (i.e., dictator) with immense unbridled power, a virtually uncontrolled discretion.[54] A statute would

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[53] See Kaplan, Obscenity as An Esthetic Category, 20 Law & Contemp. Problems (1955) 544, 551-552 as to "conventional obscenity," which he defines as "the quality of any work which attacks sexual patterns and practices. In essence, it is the presentation of a sexual heterodoxy, a rejection of accepted standards of sexual behavior. Zola, Ibsen and Shaw provide familiar examples. It surprises no one that the author of Nana also wrote J'Accuse; of Ghosts, An Enemy of the People; of Mrs. Warren's Profession, Saint Joan."

See also, Lockhart and McClure, Obscenity in the Courts, 20 Law & Contemp. Problems (1955) 586, 596-597 as to "ideological obscenity"; they note that the courts have generally refrained (at least explicitly) from basing their decisions on rulings that literally may be prescribed to guard against a change in accepted moral standards, "because any such ruling would fly squarely in the fact of the very purpose for guaranteeing freedom of expression and would thus raise serious constitutional questions."

[54] One court, at the suit of a publisher, enjoined a Chief of police—who went beyond threat of prosecution and ordered booksellers not to sell certain books—on the ground that the officer had exceeded his powers; *New American Library* v. *Allan*, 114 F. Supp. 823 (Ohio, D. C.). In another similar case, where a prosecutor was enjoined, the injunction order was much modified on appeal; *Bantam Book* v. *Melko*, 96 A. (2d) 47, modified 103 A. (2d) 256.

If, however, the prosecutor confines himself to a mere threat of prosecution, the traditional reluctance to restrain criminal prosecutions will very probably make it difficult to obtain such an injunction. *Sunshine Book Co.* v. *McCaffrey*, 112 N. Y. S. (2d) 476; see also 22 U. of Chicago L. Rev. (1954) 216; 68 Harv. L. Rev. (1955) 489.

This may be particularly true with respect to a federal prosecutor. See Jackson, The Federal Prosecutor, 24 J. of

[fol. 98a] be invalid which gave the Postmaster General the power, without reference to any standard, to close the mails to any publication he happened to dislike.[55] Yet, a federal prosecutor, under the federal obscenity statute, approximates that position: Within wide limits, he can (on the advice of the Postmaster General or on no one's advice) exercise such a censorship by threat, without a trial, without any judicial supervision, capriciously and arbitrary. Having no special qualifications for that task, nevertheless, he can, in large measure, determine at his will what those within his district may not read on sexual subjects.[56] In that way,

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Am. Jud. Soc. (1940) 18: "The (federal) prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard."

[55] See, e.g., *Joseph Burstyn Co. Inc.* v. *Wilson*, 343 U. S. 495.

[56] It is, therefore, doubtful whether, as suggested by Emerson (*loc. cit.* at 656-660), a statute calling for punishment involves very much less arbitrary conduct and very much less censorship than one calling for punishment. In actual fact, by his threats of prosecution, the prosecutor does exercise prior restraint. Much, therefore, that Emerson says of prior restraint authorized by statute applies as well to censorship through a prosecutor's threats of prosecution: The "procedural safeguards built around criminal prosecution" (the stronger burden of proof, the stricter rules of evidence, the tighter procedure) are likewise absent. The "decision rests with a single functionary," an executive official, rather than with the courts. The prosecutor, by threats of prosecution, accomplishes prior restraint "behind a screen of informality and partial concealment that

[fol. 99] the statute brings about an actual prior restraint of free speech and free press which strikingly flouts the First Amendment.[57]

(b) Judges as censors.

When a prosecution is instituted and a trial begins, much censorship power passes to the trial judge: If he sits without a jury, he must decide whether a book is obscene. If the trial is by jury, then, if he thinks the book plainly not obscene, he directs a verdict for the accused or, after a verdict of guilt, enters a judgment of acquittal. How does the judge determine whether a book is obscene? Not by way of evidence introduced at the trial, but by way of some sort of judicial notice. Whence come the judicial notice data to inform him?

Those whose views most judges know best are other lawyers. Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Association or of alumni of our leading law schools,[58] tales are told fully as

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seriously curtails opportunity for public appraisal" and entailing the "chance of discrimination and other abuse." The "policies and actions" of the prosecutor, in his censorship by threats of prosecution, are not "likely to be known or publicly debated; material and study and criticism" are not "readily available."

[57] For startling instances of "prosecutor censorship" see Blanshard, The Right to Read (1955) 184-186, 196; 22 U. of Chicago L. Rev. (1954) 216.

[58] See *Roth* v. *Goldman*, 172 F. 2d 788 at 796 (concurring opinion):

"One thinks of the lyrics sung at many such gatherings by a certain respected and conservative member of the faculty of a great law-school which considers itself the most distinguished and which is the Alma Mater of many judges sitting on upper courts."

Aubrey's Lives, containing many "salacious" tales, delights some of our greatest judges.

Mr. Justice Holmes was a constant reader of "naughty French novels." See Bent, Justice W. O. Holmes (1932) 16, 134.

"obscene" as many of those distributed by men, like defendant, convicted for violation of the obscenity statute. Should not judges, then, set aside such convictions? If they [fol. 100] do not, are they not somewhat arrogantly concluding that lawyers are an exempt elite, unharmed by what will harm the multitude of other Americans? If lawyers are not such an elite then, since, in spite of the "obscene" tales lawyers frequently tell one another, data are lacking that lawyers as a group become singularly unusually addicted to depraved sexual conduct, should not judges conclude that "obscenity" does not importantly contribute to such misconduct, and that therefore the statute is unconstitutional?

(c) Jurors as Censors

If, in a jury-case, the trial judge does not direct a verdict or enter a judgment of acquittal, the jury exercises the censorship power. Courts have said that a jury has a peculiar aptitude as a censor of obscenity, since, representing a cross-section of the community, it knows peculiarly well the average "common conscience" of the time. Yet no statistician would conceivably accept the views of a jury—twelve persons chosen at random—as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the "moral sentiments" of a generation ago, not of the present time.

Each jury verdict in an obscenity case has been sagaciously called "really a small bit of legislation ad hoc."[59] So each jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to exact hundreds of divers statutes interfering with freedom of expression? (I shall note, *infra*, the vast difference be- [fol. 101] tween the applications by juries of the "reasonable man" standard and the "obscenity" standard.)

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[59] *U. S. v. Levine*, 83 F. 2d 156; 157 (C. A. 2).

4. The dangerously infectious nature of governmental censorship of books

Governmental control of ideas or personal preferences is alien in a democracy. And the yearning to use governmental censorship of any kind is infectious. It may spread insidiously. Commencing with suppression of books as obscene, it is not unlikely to develop into official lust for the power of thought-control in the areas of religion, politics, and elsewhere. Milton observed that "licensing of books * * * necessarily pulls along with it so many other kinds of licensing." J. S. Mill noted that the "bounds of what may be called moral police" may easily extend "until it encroaches on the most unquestionably legitimate liberty of the individual." We should beware of a recrudescence of the undemocratic doctrine uttered in the 17th century by Berkeley, Governor of Virginia: "Thank God there are no free schools or preaching, for learning has brought disobedience into the world, and printing has divulged them. God keep us from both."

The people as self-guardians: censorship by public opinion, not by government

Plato, who detested democracy, proposed to banish all poets; and his rulers were to serve as "guardians" of the people, telling lies for the people's good, vigorously suppressing writings these guardians thought dangerous.[60] [fol. 102] Governmental guardianship is repugnant to the basic tenet of our democracy: According to our ideals, our adult citizens are self-guardians, to act as their own fathers,

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[60] Plato furnished "an ideal blueprint for a totalitarian society"; Chroust, Book Rev., 1 Natural Law Forum (1956) 135, 141. See also Popper, The Open Society and Its Enemies (19); Frank, Courts on Trial (1949) 146-147, 158, 350, 360, 405-406; Frank, Fate and Freedom (1949) 119, 319, note 25, 365, note 10; Frank, If Men Were Angels (1942) 192; Fite, The Platonic Legend (1934); Catlin, The Story of the Political Philosophers (1939) 52, 58, 65-66; Kallen, Ethical Aspects of Censorship, in Protection of Public Morals Through Censorship (1953) 34, 53-54.

and thus become self-dependent.[61] When our governmental officials act towards our citizens on the thesis that "Papa knows best what's good for you," they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature.

So have sagacious men often insisted. Milton, in his Areopagitica, denounced such paternalism: "We censure them for a giddy, vicious and unguided people, in such sick and weak (a) state of faith and discretion as to be able to take down nothing but through the pipe of a licensor." "We both consider the people as our children," wrote Jefferson to Dupont de Nemours, "but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self-government." Tocqueville sagely remarked: "No form or combination of social policy has yet been devised to make an energetic people of a community of pusillanimous and enfeebled citizens." "Man," warned Goethe, "is easily accustomed to slavery and learns quickly to be obedient when his freedom is taken from him." Said Carl Becker, "Self-government, and the spirit of freedom that sustains it, can be maintained only if the people have sufficient intelligence and honesty to maintain them with a minimum of legal compulsion. This heavy responsibility is the price of freedom."[62] The "great art," according to Milton, "lies to discern in what the law is to [fol. 103] bid restraint and punishment, and in what things persuasion only is to work." *So we come back, once more, to Jefferson's advice: The only completely democratic way to control publications is through non-governmental censorship by public opinion.*

5. The seeming paradox of the First Amendment.

Here we encounter an apparent paradox: The First Amendment, judicially enforced, curbs public opinion when translated into a statute which restricts freedom of expression (except that which will probably induce undesirable

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[61] See Frank, Self Guardianship and Democracy, 16 Am. Scholar (1947) 265.

[62] Becker, Freedom and Responsibility in the American Way of Life (1945) 42.

conduct). The paradox is unreal: *The Amendment ensures that public opinion—the "common conscience of the time"—shall not commit suicide through legislation which chokes off today the free expression of minority views which may become the majority public opinion of tomorrow.*

Private persons or groups, may validly try to influence public opinion.

The First Amendment obviously has nothing to do with the way persons or groups, not a part of government, influence public opinion as to what constitutes "decency" or "obscenity." The Catholic Church, for example, has a constitutional right to persuade or instruct its adherents not to read designated books or kinds of books.

6. The fine arts are within the First Amendment's protection.

"The framers of the First Amendment," writes Chafee, "must have had literature and art in mind, because our first national statement on the subject of 'freedom of the press,' the 1774 address of the Continental Congress to the inhabitants of Quebec, declared, 'The importance of this (freedom of the press) consists, beside the advancement of truth, science, morality and *arts* in general, in its diffusion [fol. 104] of liberal sentiments on the administration of government.'" [63] 165 years later, President Franklin Roosevelt said, "The arts cannot thrive except where men are free to be themselves and to be in charge of the discipline of their own energies and ardors. The conditions for democracy and for art are one and the same. What we call liberty in politics results in freedom of the arts." [64] The converse is also true.

In our industrial era when, perforce, economic pursuits must be, increasingly, governmentally regulated, it is especially important that the realm of art—the non-economic realm—should remain free, unregimented, the domain of

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[63] Chafee, Government and Mass Communication (1947) 53.

[64] Message at dedicating exercises of the New York Museum of Modern Art, May 8, 1939.

free enterprise, of unhampered competition at its maximum.[65] An individual's taste is his own, private, concern. *De gustibus non disputandum* represents a valued democratic maxim.

Milton wrote: "For though a licenser should happen to be judicious more than the ordinary, yet his very office * * * enjoins him to let pass nothing but what is vulgarly received already." He asked, "What a fine conformity would it starch us all into? * * * We may fall * * * into a gross conformity stupidly * * *." In 1859, J. S. Mill, in his essay on *Liberty*, maintained that conformity in taste is not a virtue but a vice. "The danger," he wrote, "is not the excess but the deficiency of personal impulses and preferences. By dint of not following their own nature (men) have no nature to follow * * *. Individual spontaneity is entitled to free exercise * * * That so few men dare to be eccentric marks the chief danger of the time." Pressed by the demand for conformity, a people degenerate into "the deep slumber of a decided opinion," yield a "dull and torpid consent" to the accustomed. "Mental despotism" [fol. 105] ensues. For "whatever crushes individuality is despotism by whatever name it be called * * * It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating * * * In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them."

To vest a few fallible men—prosecutors, judges, jurors—with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a "moral police," is to make them despotic arbiters of literary products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too

[65] Frank, Fate and Freedom (1945) 194-202.

plentiful, should be cherished, not stifled. An author's imagination may be cramped if he must write with one eye on prosecutors or juries; authors must cope with publishers who, fearful about the judgments of governmental censors, may refuse to accept the manuscripts of contemporary Shelleys or Mark Twains or Whitmans.[66]

Some few men stubbornly fight for the right to write or publish or distribute books which the great majority at the time consider loathsome. If we jail those few, the community may appear to have suffered nothing. The appear- [fol. 106] ance is deceptive. For the conviction and punishment of these few will terrify writers who are more sensitive, less eager for a fight. What, as a result, they do not write might have been major literary contributions.[67]

Milton said that the "sense" of a great man may "to all posterity be lost for the fearfulness, or the presumptuous rashness of a perfunctory licenser."

"Suppression," Spinoza said, "is paring down the state till it is too small to harbor men of talent."

7. The motive or intention of the author, publisher or distributor cannot be the test.

Some courts once held that the motive or intention of the author, painter, publisher or distributor constituted the test of obscenity. That test, the courts have abandoned: That a man who mails a book or picture believes it entirely "pure" is no defense if the court finds it obscene.[68] *U. S.* v. *One Book Entitled Ulysses*, 72 F. 2d 705, 708 (C. A. 2). Nor, conversely, will he be criminally liable for mailing a "pure" publication—Stevenson's Child's Garden of Verse or a simple photograph of the Washington Monument—he believes obscene. Most courts now look to the "objective" intention, which can only mean the effect on those who read

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[66] Milton remarked that "not to count him fit to print his mind without a tutor or examiner, lest he should drop * * * something of corruption, is the greatest * * * indignity to a free and knowing spirit that can be put upon him."

[67] *Cf.* Chaffee, The Blessings of Liberty (1956) 113.

[68] *Rosen* v. *U. S.*, 161 U. S. 29, 41-42; cf. *U. S.* v. *One Book Entitled Ulysses*, 72 F. 2d 705, 708 (C. A. 2).

the book or see the picture;[69] the motive of the mailer is irrelevant because it cannot affect that effect.

8. Judge Bock's decision as to the causal relation to anti-social conduct.

In *Commonwealth* v. *Gordon*, 66 Pa. D & C 101 (1949), Judge Bok said: "A book, however sexually impure and [fol. 107] pornographic * * * cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurement into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience; too much can intervene and too many diversions take place * * * The only clear and present danger * * * that will satisfy * * * the Constitution * * * is the commission or the imminence of the commission of criminal behavior resulting from the reading of a book. Publication alone can have no such automatic effect." The constitutional operation of "the statute," Judge Bok continued, thus "rests on narrow ground * * * I hold that (the statute) may constitutionally be applied * * * only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question; the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt."

I confess that I incline to agree with Judge Bok's opinion. But I think it should be modified in a few respects: (a) Because of the Supreme Court's opinion in the *Dennis* case, 341 U. S. 494 (1951), decided since Judge Bok wrote, I would stress the element of probability in speaking of a "clear danger." (b) I think the danger need not be that of probably inducing behavior which has already been made criminal at common law or by statute, but rather of probably inducing any seriously anti-social conduct (i.e., conduct

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[69] *U. S.* v. *Levine*, 83 F. 2d 156 (C. A. 2); *Parmelee* v. *U. S.*, 113 F. 2d 729 (App. D. C.).

which, by statute, could validly be made a state or federal crime). (c) I think that the causal relation need not be between such anti-social conduct and a particular book [fol. 108] involved in the case on trial, but rather between such conduct and a book of the kind or type involved in the case.[70]

9. The void-for-vagueness argument

There is another reason for doubting the constitutionality of the obscenity statute. The exquisite vagueness of the word "obscenity" is apparent from the way the judicial definition of that word has kept shifting: Once (as we saw) the courts held a work obscene if it would probably stimulate improper thoughts or desires in abnormal persons; now most courts consider only the assumed impact on the thoughts or desires of the adult "normal" or average human being. A standard so difficult for our ablest judges to interpret is hardly one which has a "well-settled" meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, e.g., *International Harvester* v. *Kentucky*, 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.*, 244 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 885; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Champlin Refining Co.* v. *Commission*, 286 U. S. 120; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *N. Y.*, 333 U. S. 507; cf. *U. S.* v. *Cardiff*, 343 U. S. 169.

If we accept as correct the generally current judicial standard of obscenity—the "average conscience of the time"—that standard still remains markedly uncertain as a guide to judges or jurors—and therefore to a citizen who contemplates mailing a book or picture. To be sure, we trust juries to use their common sense in applying the "reasonable man" standard in prosecutions for criminal negligence (or the like); a man has to take his chances on jury [fol. 109] verdicts in such a case, with no certainty that a

[70] According to Judge Bok, an obscenity statute may be validly enforced when there is proof of a causal relation between a particular book and undesirable conduct. Almost surely, such proof cannot ever be adduced. In the instant case, the government did not attempt to prove it.

jury will not convict him although another jury may acquit another man on the same evidence.[71] But that standard has nothing remotely resembling the looseness of the "obscenity" standard.

There is a stronger argument against the analogy of the "reasonable man" test: Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507; *Kunz* v. *New York*, 340 U. S. 290; *Burstyn Inc.* v. *Wilson*, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218.[72]

WATERMAN, *Circuit Judge*, concurring:

I concur with my colleagues in affirming the judgment below. I would dispose in one sentence of the claim advanced that the applicable statute, 18 U. S. C. A. § 1461, is unconstitutional, for I believe the constitutionality of such legislation is so well settled that: "If the question is to be reopened the Supreme Court must open it. *Tyomies Publishing Company* v. *United States*, 6 Cir., 211 Fed. 385."—quoting Learned Hand, *C.J.*, *in U. S.* v. *Rebhuhn*, 2 Cir. 1940 109 F. 2d 512 at 514, cert. denied 310 U. S. 629. I concur with Chief Judge Clark in his disposition of the remaining issues.

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[71] *Nash* v. *U. S.*, 229 U. S. 373, 377; *U. S.* v. *Wurzbach*, 280 U. S. 396, 399; *U. S.* v. *Ragen*, 314 U. S. 513, 523.

[72] In *U. S.* v. *Rebhuhun*, 109 F. 2d 512, 514 (C. A. 2), the court tersely rejected the contention that the obscenity statute is too vague, citing and relying on *Rosen* v. *U. S.*, 161 U. S. 29. But the *Rosen* case did not deal with that subject but merely with the sufficiency of the wording of an indictment under that statute.

[fol. 110] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge, Hon. Jerome N. Frank, Hon. Sterry R. Waterman, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

SAMUEL ROTH, Defendant-Appellant

JUDGMENT—September 18, 1956

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 111] [Filed endorsement omitted].

[fol. 112] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 113-114] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956.

No. —

SAMUEL ROTH, Petitioner

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 9, 1956

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

November 17, 1956.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 9th day of October, 1956.

[fol. 115] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to questions 1, 2, and 3 presented by the petition for the writ which read as follows:

"1. Does the federal obscenity statute (18 U.S.C. §1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech and freedom of the press guarantees of the First Amendment?

"2. Does the federal obscenity statute (18 U.S.C. § 1461,

62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?

"3. Does the federal obscenity statute (18 U.S.C. §1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?"

The case is consolidated with Nos. 61 and 107 and a total of three hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3935-4)

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PROBABLE JURISDICTION NOTED JANUARY 10, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 61

DAVID S. ALBERTS, APPELLANT,

vs.

STATE OF CALIFORNIA

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, LOS ANGELES COUNTY, APPELLATE DEPARTMENT

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[fol. 1] [File endorsement omitted]

IN THE MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

CR. A3350

Case No. 2360

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

DAVID S. ALBERTS and VIOLET E. ALBERTS, Defendants

COMPLAINT—MISDEMEANOR—Filed September 6, 1955

Personally appeared before me the undersigned who, first being duly sworn, complains and says: Frank W. Bridges.

That on or about the 25th day of February, 1955, at and in the Beverly Hills Judicial District, in the County of Los Angeles, State of California, a misdemeanor, to wit, Violation of Subdivision 3 of Section 311 of the Penal Code of the State of California, was committed by David S. Alberts and Violet E. Alberts, (whose true name to affiant is unknown), who at the time and place last aforesaid did willfully, unlawfully and lewdly, in the County of Los Angeles, write, compose, stereotype, print, publish, sell, distribute, keep for sale and exhibit obscene and indecent writings, papers and books; and design, copy, draw, engrave, paint and otherwise prepare obscene and indecent pictures and prints; and mold, cut, cast and otherwise make obscene and indecent figures.

3-1-55—Warrants issued to Sheriff's Vice Detail—Bail set at $1,000 each.

3-8-55—Issued subpoenas on part of defendants.

3-17-55—Subpoenas issued.

3-2-55—U. S. Fidelity & Guaranty #A-12108 (Violet E. Alberts).

3-2-55—U. S. Fidelity & Guaranty #A-12107 (David S. Alberts) both bonds for $1,000.

[fol. 2] Count II

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charge set forth herein, complainant further complains and says: That on or about the 25th day of Feb., 1955, at and in the Beverly Hills Judicial District, County of Los Angeles, State of California, a misdemeanor, to wit, Violation of Section 311, Subdivision 4 of the Penal Code of the State of California, was committed by David S. Alberts and Violet E. Alberts (whose true name to affiant is unknown) who, at the time and place last aforesaid, did willfully, unlawfully and lewdly, in the County of Los Angeles, write, compose and publish a notice and advertisement of an obscene and indecent writing, paper, book, picture, print and figure.

[fol. 3] Count III

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth herein, complainant further complains and says: That on or about the 25th day of Feb., 1955, at and in the Beverly Hills Judicial District, County of Los Angeles, State of California, a misdemeanor, to wit, Violation of Section 311, Subdivision 5 of the Penal Code of the State of California, was committed by David S. Alberts and Violet E. Alberts (whose true name to affiant is unknown) who, at the time and place last aforesaid, did willfully, unlawfully and lewdly produce, prepare, sell, distribute, keep for sale, exhibit, buy, rent, use, keep and maintain recordings and transcriptions used and intended to be used in producing and reproducing a lewd and obscene song, ballad and words.

[fol. 4] Count IV

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth herein, complainant further complains and says: That on or about the 25th day of Feb., 1955, at and in the Beverly Hills Judicial District, County of Los Angeles, State of California, a misdemeanor, to wit, Viola-

tion of Section 647, Subdivision 5 of the Penal Code of the State of California, was committed by David S. Alberts and Violet E. Alberts (whose true name to affiant is unknown) who, at the time and place last aforesaid, were willfully and unlawfully lewd and dissolute persons.

Said complainant therefore prays that a warrant may be issued for the arrest of said defendants who may then be dealt with according to law.

Subscribed and sworn to before me on the 1st of March, 1955.

Frank W. Bridges, Dy Kibley, by C. Kuebel.
Arresting officer employed by —— ——.

Witnesses

Frank W. Bridges, Sheriff's Vi.
Rusty Brooks, 5446 Lemon Grove—HO 94349.
H. B. Cains, 8731 Santa Monica Blvd—BR 25025.
Sgt. P. Q. Barnes, LAPD—AVI.
Sgts. Gerald Holland and N. E. Riley; LAPD—Hwd Vi.
Robert Wallace and Russell Gardner; Sheriff's Vi.
Richard O. Collins, LAPD—AVI.
Tanagra, Regas, 6144 Linforth—HO 38488.

[fol. 5] In the Municipal Court of Beverly Hills Judicial District County of Los Angeles, State of California

Transcript of Docket (Criminal)

Case No. M-2360

The People of the State of California

vs.

David S. Alberts and Violet E. Alberts

David Alberts, U. S. Fidelity $1000.00. Bail Posted, Date: Bond No. 3-2-55, Receipt A-12107.

Violet Alberts, U. S. Fidelity, $1000.00. Bail Posted, Date: Bond No. 3-2-55, Receipt A-12108.

Date/s of offense/s 2-25-55.

3-1-55. Complaint filed, sworn to by Frank W. Bridges (Sheriff's Vice), charging Defendant/s with having com-

mitted in said Judicial District the Misdemeanor offense/s of: Violation of Section/s Count 1-311.3 Count 2-311.4 Count 3-311.5 & Count 4-647.5 all penal code. Warrant of Arrest issued to Sheriff's Vice Detail for each defendant. Bail set at $1,000.00 each.

3-3-55. Defendants in Court with attorney R. Maddox for arraignment. Ask continuance for arraignment. Set for 3-17-55 at 9 A.M. At request of attorney Maddox, hearing under penal code section 1539, set for 3-9-55 at 2 P.M.

3-8-55. Subpoenas issued on part of defendants for hearing on 3-9-55 at 2 P.M.

3-9-55. Defendants in Court on hearing under 1539 penal code. People represented by D/D/A Nelson. Defendants represented by attorney Maddox. Matter regarding section 1539 penal code off calendar.

3-17-55. Both defendants in Court represented by attorney R. Maddox. Jury waived and reading of complaint waived. Both defendants plead not guilty and ask for COURT TRIAL. Set for April 28, 1955 at 9:30 A.M. Bail to continue.

3-17-55. Subpoenas issued.

4-21-55. Defendants in Court with attorney Maddox. Move for continuance. Defendants and attorney waive statutory rights to time of trial. Case continued to 6-9-1955 at 9:30 A.M. Bail to remain as posted.

4-22-55. Vice Detail notified to advise witnesses not to appear on 4-28-55 at 9:30 A.M.

4-22-55. New subpoenas issued.

6-9-55. Cause called for Court Trial. People represented by D/D/A Nelson. Defendants in Court represented by attorney C. R. Maddox. Court reporter at request of defense attorney Maddox (John W. Lapointe). Peoples witness sworn: 1—Frank W. Bridges, 2—Russell Gardner, 3—Hank B. Cains, 4—Tanagra Regas, 5—Robert J. Wallace, 6—Robert A. Wood.

Peoples exhibits filed: 1—Bundle of booklets, 2—Advertising Brochure, 3—Sales Brochure, 4—(Pictures Tina's Torture), 5—8 large booklets, 6—20 packets of pictures, 7—Three Small packet labels, 8—Advertising brochure, 9—Six bound books, 10—Ten issues of magazine, 11—Book & yellow 12—Box of stero 13—Envelope of negative, 14—Sheets of

photos, 15—Envelope of negative 6 girls, 16—Envelopes, 6 negatives to page, 17—Letter 18—(Brochure) 19—(Picture, 20—(4x5 negatives) 21—Four books, 22—(1 book), 23—(4x5 negative).

Motion of defense for acquittal. Recess to June 10, 1955. [fol. 6] 6-10-55. All parties present. Court finds as to count 3 & 4—no conviction could be had, therefore dismissal of counts 3 & 4. Motion denied as to counts 1 & 2. Defendant's witness sworn: 11—Stanley H. Fleishman, 2—David S. Alberts, 3—Mrs. D. Alberts. Defendant David S. Alberts found guilty on counts 1 & 2. Sentence set for June 24, 1955 at 9 A.M. Bail to continue as posted. Defendant Violet Alberts found not guilty on count 1 & 2. (Her) bail exonerated.

6-24-55. Defendant in Court with attorney Maddox. People represented by D/D/A Nelson. Motion by defendant's attorney for new trial. Motion Denied. Motion by defendant's attorney that the matter be referred to County Probation. Motion Denied: Defendant sentenced on counts 1 & 2. Count 1: Sentence suspended and defendant placed on summary probation on the following terms and conditions: 1—Defendant not to violate section 311 P. C. 2—Defendant to pay a fine of $500.00 or serve one day County Jail for each $10.00 unpaid, and serve 60 days in County jail. Count 2: Sentence suspended & defendant placed on summary probation on the following terms and conditions: 1—Defendant not to further violate penal code 311-4 or any subsection thereof or have in his possession any obscene or indecent literature or pictures in two years. Bail exonerated. Written notice of appeal filed. Oral notice of appeal filed in open Court. Bail $1,000.00 on appeal bond. All business records to be returned to defendant. All obscene matter to be confiscated and destroyed, that are now held by People.

6-28-55. Affidavit and order extending time to file statement on appeal filed by attorney.

7-12-55. Defendant's amended Statement On Appeal filed.

7-19-55. Original and copy of reporter's transcript on appeal filed.

7-20-55. Notice of filing of transcript filed.

[fol. 7] Clerk's Certificate to Transcript of Docket (omitted in Printing).

[fol. 8] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. M-2360

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respond

vs.

DAVID S. ALBERTS, Defendant and Appellant

DEFENDANT'S AMENDED STATEMENT ON APPEAL—

Filed July 12, 1955

Now comes the appellant, David S. Alberts, defendant in the Municipal Court of the Beverly Hills Judicial District proceeding No. M-2360, and sets forth his statement on appeal as follows:

That heretofore on the 1st day of March, 1955, the above named appellant, and one Violet E. Alberts, as defendants, were jointly charged in a misdemeanor complaint with violations of the Penal Code as follows:

In Count 1 with the violation of subdivision 3 of Section 311, in Count 2 with violation of subdivision 4 of Section 311, in Count 3 with violation of subdivision 5 of Section 311, and in Count 4 with violation of subdivision 5 of Section 647.

That said violations were alleged to have been committed on the 25th day of February in the County of Los Angeles, State of California.

That thereafter the defendants were duly arraigned, expressly waived a trial by jury and after due proceedings had said trial was had on the 9th and 10th days of June, [fol. 9] 1955, in Division 1 of the Municipal Court of the Beverly Hills Judicial District, the Honorable Charles J.

Griffin, Judge presiding, the defendants being represented by C. Richard Maddox and the People being represented by James Nelson, deputy district attorney.

People's Case—Introduction of Evidence

The People called as witnesses Deputy Sheriffs of the County of Los Angeles and Police Officers of the Vice Detail of the City of Los Angeles, who testified in substance that pursuant to search warrants certain photographs, books and writings were found in various establishments, including the residence and places of business of defendants.

Defendants' Motion for Acquittal

Upon the conclusion of the People's case the defense moved the Court to acquit said defendants on the grounds that the corpus delecti of the offenses charged had not been established and after proceedings and argument the Court granted the defendants' motion as to Counts 3 and 4 of the complaint.

Defendants' Case

The defendants called Stanley Fleishman, a member of the law firm of Brock, Easton and Fleishman, who is a member of the California and New York Bars. Preliminary questions were asked the witness concerning his qualifications as a specialist in practicing before the Postal Department, and in Federal proceedings. Objections were made by the prosecution as to questions pertaining to legal counsel and advice given said defendants. Said objections were sustained by the Court.

Offer of Proof by Defendants

The defense thereupon made an offer of proof indicating that the testimony of the witness Fleishman would substantiate defendants' contention that they were not acting lewdly as charged under the provisions of Section 311 of the Penal Code. Said offer of proof indicated that the wit- [fol. 10] ness Fleishman had represented defendants in numerous Federal Court proceedings relating to much of the material and advertisements introduced in evidence in this

proceeding and that the Federal Courts had ruled that much of said material and advertisements were not obscene. Said offer of proof further included the representation that said defendants would testify that they had relied upon the advice and counsel of the witness Fleishman and that accordingly were acting lawfully and not lewdly or wantonly in violation of Section 311 of the Penal Code. Said offer of proof was refused by the Court and the defense called the defendants as witnesses on their own behalf.

Defense

The defendant David S. Alberts, being one of the defendants called, testified in substance that he was engaged in the mail order business and that he had not acted lewdly in doing any of the acts charged against him; that said defendant's statements on direct examination were limited by ruling of the Court to the direct question as to whether or not defendant had acted lewdly in the sale, distribution or keeping for sale, etc., of the merchandise heretofore held by the Court to be obscene.

Objections were sustained to questions asked the defendant as to his reliance upon counsel and facts surrounding the possession, sale and intent with which the defendant carried on the sale and distribution of his mail order business.

Upon cross-examination the People were permitted to question defendant concerning his prior court experiences, irrespective of the fact that the People had objected to the same questions asked him on direct examination, which were sustained at the time.

Judgment of the Court

The Court rendered judgment for the People and against the defendant David S. Alberts on Counts 1 and 2 of the complaint. The Court rendered judgment against the Peo-
[fol. 11] ple and for the defendant Violet E. Alberts, and said defendant was thereupon acquitted on all charges and her bond exonerated.

Motion for a New Trial

That thereafter on June 14, 1955, the defendant David S. Alberts by written notice of motion advised the Court and the People that on the 24th day of June, 1955, that said defendant would move the Court for a new trial on the grounds set forth in Section 1181 of the Penal Code, towit, subdivisions 5 and 6; that included with said written notice of motion for a new trial was a memorandum of grounds and points and authorities.

That thereafter on the 24th day of June, 1955, the defendant orally made a motion for a new trial, supplemented by said written notice, and the Court after due proceedings denied said motion.

Sentence

The defendant requested the Court to file an application for probation and upon order of Court said request and motion was denied and the defendant was thereupon sentenced by order of Court.

Grounds of Appeal

That the Court committed reversible error as follows: That although the Court found that certain exhibits were in fact obscene before the defendant could be found guilty in violation of Section 311 of the Penal Code it was necessary that the Court find that defendant acted lewdly in the selling, distribution, etc., of said obscene material.

1. That the Court precluded the defendant from introducing evidence to show his state of mind on said issue of specific intent.

2. That defendant was limited in his direct examination to conclusions that he was not acting lewdly.

[fol. 12] 3. That the rights of defendant were prejudiced in that the People were permitted on cross-examination to elicit information concerning previous court experiences and background of defendant, although the People had made objections, which were sustained, to the defendant being questioned upon the same subject matter on direct examination.

4. That the defendant was denied the right to state ulti-

mate facts as to the basis of his conclusion, opinion and attitude as to why he did not act lewdly as provided for in Section 311 of the Penal Code.

5. That the defendant was denied the right to produce evidence by the witness Fleishman in corroboration of his lack of specific intent to act lewdly in violation of Section 311 of the Penal Code.

6. That said evidence that the Court erred in excluding, and such errors and grounds as heretofore set forth, constituted reversible error in that said defendant was presented from introducing evidence material to his defense.

7. That the evidence was insufficient to show that any of the matter or thing was obscene or indecent or that the defendant acted wilfully and lewdly.

8. That the evidence was insufficient to show that the defendant composed or published any notice or advertisement of any obscene writing, paper, book, picture, print or figure.

9. Penal Code, Section 311, subdivisions 3 and 4 under which defendant was convicted is unconstitutional on its face, violating as it does the First and Fifth Amendments of the United States Constitution and Article I, Sections 9 and 13 of the California Constitution.

10. Penal Code, Section 11, subdivisions 3 and 4 under which defendant was convicted is unconstitutional as applied to defendant herein, violating as it does the First and [fol. 13] Fifth Amendments to the United States Constitution and Article I, Sections 9 and 13 of the California Constitution.

11. Defendant was denied his constitutional rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution and Article I, Section 13 of the California Constitution in that he was denied due process of law and was not informed of the nature and cause against him.

12. Penal Code, Section 311, subdivisions 3 and 4 as applied to the defendant in this case is void since the Federal Government has legislated fully in the area of mailing and advertising obscene matter and the Federal Government has preempted the field.

Settlement of Transcript

To the Honorable Charles J. Griffin, Judge Presiding, and James Nelson, Deputy District Attorney of Los Angeles County:

You, and each of you, will please take notice that the appellant will file and make a part hereof as provided by law, and rule of Court, a transcript of the proceedings and evidence reported in said proceedings, pertaining to the reversible errors complained of and heretofore alleged in defendant's statement on appeal. Said transcript will be filed on or before July 26, 1955.

Dated: July 12, 1955.

C. Richard Maddox, Stanley Fleishman, By Stanley Fleishman, Attorneys for Defendant and Appellant.

Order Allowing and Settling Defendant's Statement on Appeal

I hereby certify that the foregoing Statement on Appeal entitled "Defendant's Amended Statement on Appeal", consisting of six pages is correct and the same is settled and allowed as the Settled Statement on Appeal together with the Reporter's transcript on file herein.

Dated August 19th, 1955.

Charles J. Griffin, Judge.

I concur with the above certification.

Dated August 22, 1955.

James F. Nelson, Dep. Dist. Atty.

[fols. 14-71] Affidavit of Service by Mail—(Omitted in Printing)

[fol. 72] [File endorsement omitted]

LETTER TRANSMITTING ANALYSIS OF EXHIBITS—Filed November 22, 1953

S. Ernest Roll, District Attorney
George W. Kemp, Chief Deputy
C. H. Ebbets, Chief, Bureau of Investigation

County of Los Angeles
Office of the District Attorney
600 Hall of Justice
Los Angeles 12, California

Mutual 2141

November 18, 1953.

Appellate Department
Superior Court
1605 City Hall
Los Angeles 12, California

Gentlemen:

Pursuant to this court's request on oral argument we are enclosing a copy of an "Analysis of Exhibits" prepared by Deputy District Attorney Fred N. Whichello. This analysis was originally prepared primarily for our own use in organizing and keping track of the numerous exhibits, and was therefore not intended to evaluate all of the evidence. Also our opinion as to what is obscene, very obscene, etc. is not intended to be exhaustive. However, we do hope that it may be of some aid and assistance in the court's analysis and organization of the numerous exhibits and voluminous record in this case.

We would also like to call the court's attention to the case of People v. Pickwick Book Shop Inc., et al., Cr. A. 2314, decided by this court. Through inadvertence we failed to cite this case in our brief but feel that it may be of some assistance in this matter.

A copy of the foregoing and of the analysis is being sent to Mr. Stanley Fleishman, attorney for defendants and appellants.

Sincerely, Lewis Watnick, Deputy District Attorney, Appellate Division.

LW:ml.

[fol. 73] ANALYSIS OF EXHIBITS

Exhibit No.	Description and Comment	Advertised In	Degree of Obscenity and Reference
1	Julius Haldeman Books—not obscene fraud	Ex. 3	
2	Advertising Brochure		
3	" " yellow paper		
4	"Tina's Torture"—cartoon strips	Ex. 2	@ moderately obscene
5	9 books—soft covers:		
	"Petting as an Erotic Exercise"	Ex. 3 No. 15	(See pp. 17, 19) X very obscene
	"The Picture of Conjugal Love"	Ex. 3 No. 13	X very obscene
	"Female Homosexuals"	Ex. 3 No. 17	
	"Questions and Answers about Oragenital Contacts"	Ex. 3 No. 24	X very obscene (See p. 24)
	"Male Homosexuals Tell Their Stories"	Ex. 3 No. 16	
	"The Business Side of the Oldest Business"	No	
	"Bestiality and the Law"	Ex. 3 No. 5	
	"Bestiality in Ancient and Modern Times"	Ex. 3 No. 6	
	"Wm. Heirens Notorious Sex Maniac"	No	
6	20 packets of photos—all spanking etc.	Ex. 2	@ moderately obscene
7	3 packets labels (reflect commercial activity)		
8	Advertising Brochure		

[fol. 74]

9	5 books—hard covers:		
	"The Pleasures of the Torture Chamber" "To Beg (etc.) London Prostitute"		@ moderately obscene
(9)	"Witch on Wheels"		X very obscene (See p. 105 Tr. Judge's comment re p. 17)
	"She Made it Pay"		X very obscene (See p. 106 Tr. Judge's comment re pp. 50–53)
	"Snow Job"		(See Judge's comment p. 106 Tr.)
10	10 copies "Good Times" magazine		(See Judge's comment p. 107 Tr.)
11	"Sword of Desire"		X very obscene (See Judge's comment p. 107 Tr.)
12	Stereos and viewer	Ex. 2	X very obscene (See Judge's comment p. 108 Tr.)
13	Negatives and cartoons	Ex. 2	@ moderately obscene
14	Photographs—spanking, hair pulling	Ex. 2	@ moderately obscene
15	Negatives and photos—spanking, hair-pulling		@ moderately obscene
16	" "		@ moderately obscene
17	Letter from mother of 8 yr. old boy		
18	Same as Ex. 3		

Exhibit No	Description and Comment	Advertised In	Degree of obscenity and Reference
19	8 x 10 photo nude		
20	negative photo 4 x 5		
21	4 booklets—3 spanking, etc. 1 re chastity belts		@ very obscene
22	Booklet "Unique"—whipping		@ very obscene
23	4 x 5 negative—nude		

Key To Symbols: X—heterosexual
@—sado-masochistic

Note: The above is only a very partial analysis of the exhibits. This analysis was originally made only for the benefit of the District Attorney's Office, and should not be construed as being a thorough analysis of the evidence introduced in the matter. In all probability there are other passages and exhibits introduced herein that might be considered obscene which were not checked in the analysis.

[fol. 75] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, APPELLATE DEPARTMENT

No. CR A3350

ANSWER TO APPELLEE'S "ANALYSIS OF EXHIBITS"—Filed November 23, 1955

Of the hundreds or thousands of items taken from Appellant on February 25, 1955, Appellee presumably introduced the most lurid. If we assume that the District Attorney who tried the case believed that each of the items introduced as an exhibit was obscene we find that the District Attorney's office has apparently changed its mind and now according to the analysis believes that the following items introduced as obscene are not obscene after all:

(1) "Ballad of a Nun and Other People"—Exhibit 1.
(2) "Homosexual Life"—Exhibit 1.
(3) "Lives of the Courtesans"—Exhibit 1.
(4) "How to be Married Though Happy or How to be Happy Though Married"—Exhibit 1.
(5) "The Prostitute and her Lover"—Exhibit 1.
(6) "Love Affair of a Priest and a Nun"—Exhibit 1.
[fol. 76] (7) "Amorous Details of the Monks"—Exhibit 1.
(8) "Wild Women of Broadway"—Exhibit 1.

(9) "Strange Marriage Customs"—Exhibit 1.
(10) "Confessions of a Minister's Daughter"—Exhibit 1.
(11) "The Fleece of Gold"—Exhibit 1.
(12) "Female Homosexuals"—Exhibit 5.
(13) "Male Homosexuals Tell Their Stories"—Exhibit 5.
(14) "The Business Side of the Oldest Business"—Exhibit 5.
(15) "Bestiality and the Law"—Exhibit 5.
(16) "Bestiality in Ancient and Modern Times"—Exhibit 5.
(17) "Wm. Heirens, Notorious Sex Maniac"—Exhibit 5.
(18) "To Beg, etc., London Prostitute"—Exhibit 9.
(19) "Snow Job"—Exhibit 9.
(20) 10 copies "Good Time" magazines—Exhibit 10.
(21) 8 x 10 photo, nude—Exhibit 19.
(22) Negative photo 4 x 5—Exhibit 20.
(23) 4 x 5 negative, nude—Exhibit 23.

The only items which were thought to be "very obscene" by the District Attorney and which were clearly kept for distribution by mail are three books found in Exhibit 5. As we previously pointed out, the Trial Judge found the booklets composing Exhibit 5 to be not obscene (Rep. Tr. p. 104, lines 4-10). The suggestion by the District Attorney made on oral argument that if the Trial Judge found them to be not obscene it was only because he did not read them does not help the Appellee's position. The Appellee asks this Court to affirm a judgment of a trial court arguing that the Trial Judge as the "constitutional arbiter of the facts" (Appellee's Opening Brief, p. 16, lines 15-16) must be given great weight. But this Court cannot affirm the conviction below upon evidence which the Trial Court found would *not* support a conviction.

The two books in Exhibit 9 and the book in Exhibit 11 which the District Attorney thought were "very obscene" (fol. 77) were not kept for sale, etc. according to the uncontradicted testimony of Appellant (Rep. Tr. p. 127, line 15; P. 129, line 5). Moreover, as we have observed before the Judge did not read these books in their entirety (Rep. Tr.

p. 104, lines 11-12; p. 107, lines 22-24). It should also be observed that these books were not advertised in any of the brochures introduced in evidence.

Apparently it is the Appellee's theory that it proves a keeping for sale by showing that particular items are advertised for sale. As to these books then, since they were not advertised for sale and there was no other evidence that they were kept for sale there was an absolute failure of proof.

Exhibit 12 which the Appellee says was "very obscene" was found in the office at Melrose Avenue (Appellee's Opening Brief p. 6, lines 17-24)—not in the warehouse on Santa Monica Boulevard (Appellee's Opening Brief, p. 7, lines 18-22) in a locked cabinet in Appellant's office (Rep. Tr. p. 31, line 23; p. 32, line 13). Although advertising brochures were mailed from the office (Rep. Tr. p. 40, lines 10-15) the wares were not (Rep. Tr. p. 40, lines 16-19). The merchandise that was kept for distribution or sale through the mails was kept at the warehouse on Santa Monica Boulevard.

Apparently as an afterthought Appellee contends that Exhibit 12 was advertised in Exhibit 2. The copy of the analysis furnished us shows that Exhibit 2 is typed in ribbon whereas the balance of the matter referring to Exhibit 12 are carbons. It is true that Exhibit 2 refers to Stereos but it does not refer specifically to Exhibit 12. Indeed the copy of the inventory (Rep. Tr. p. 37, lines 1-5) shows that the following stereos were taken from the warehouse:

> 6 sets each stereo slides T3-T4-503a (p. 2 of inventory).
>
> 6 sets each stereo slides N, NS, 5S, 10S, 25S, 5ASB, 5NAS, 5 NS, 5 NAS, 30S, 80S, 240S, 5 ASR, 5 ASY, [fol. 78] 5 ASB, "Specials", 2 SY, 2 SR, 25B, WIS (p. 2 of inventory).
>
> 6 boxes NS stereos (p. 2 of inventory).
>
> 1 box of 413c (p. 2 of inventory).
>
> 1 box "stereos" 5 NAS (numerous valued) (p. 2 of inventory).
>
> 6 each sets stereo slides T8, T10, T11 (p. 2 of inventory).

6 stereo slides Ks, 4, 6, 7, 8, (6 each set) (p. 4 of inventory).

6 each sets stereo slides Nos. 11, 12, 13, 14, 15 "MMS" (p. 4 of inventory).

6 each sets stereo slides "MMS" 6, 7, 8, 9, 10 (p. 4 of inventory).

6 each sets stereo slides "MMS" 1, 2, 3, 4, 5 (p. 4 of inventory).

6 each sets stereo slides "MMS" 16, 17, 18, 19, 20 (p. 4 of inventory).

6 each sets stereo slides T8, T11 (p. 4 of inventory).

6 sets stereo slides S-1, S-6, S-5, S-4, S-3, S-3 (1 set) (p. 5 of inventory).

6 sets stereo slides T-5, T-3, T-2, T-1 (p. 5 of inventory).

The circulars offered no proof that the stereos introduced as Exhibit 12 were kept for sale or distribution, and there is no other proof.

In the analysis Exhibits 21 and 22 were changed in pen from "moderately obscene" to "very obscene". In any event they were found in the home and the Trial Judge did not convict on those exhibits.

We assume that when the District Attorney says an item is moderately obscene he means that there is room for a difference of opinion and that a lewd intent could not be spelled out of mere distribution by mail of the "moderately obscene" items.

Therefore, if our analysis of the evidence is correct there was not a single item of a "very obscene" nature which the Trial Court relied upon and was shown to be kept for sale or distributed, etc. by Appellant.

[fol. 79] The difficulty this Court is having in segregating and evaluating the exhibits illustrates the essential unfairness of the charge and trial. The exhibits were placed before the Trial Judge en masse on June 9, 1955, the Court recessing at 3:45 P.M. (Rep. Tr. p. 90, line 8). Thereafter he went over this mass of exhibits as well as a large number of legal authorities (Rep. Tr. p. 93, lines 5-6). The next morning he found them obscene at least in part (Rep. Tr.

p. 111, lines 1-2). This is not a conviction in accordance with law but rather one based upon emotion, confusion and prejudice.

The Trial Court made it plain that he did not like the Appellant's business (Rep. Tr. p. 111, lines 16; p. 142, line 1) and that he was convicting because Appellant was at least close to the line (Rep. Tr. p. 148, line 21; p. 149, line 8). But the United States Court of Appeals has held that there is nothing unlawful per se in the business, *Olesen v. Staunard*, decided October 26, 1955.

The note on the bottom of Appellee's analysis also reflects the essential unfairness of the entire proceeding. Nine months after the arrest the prosecuting attorney still cannot say definitively what he considers obscene in all of the exhibits introduced against Appellant.

The language of *People v. Sarazzowski*, 27 C 2d 7 is here applicable:

> "When we speak of administering 'justice' in criminal cases, under the American or English system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure in which the substantial rights belonging to [fol. 80] defendants shall be respected:"

Also apt are the words of a unanimous Supreme Court in *Smith v. O'Grady*, 312 U.S. 329, 334, where the Court said that the defendant was "denied any real notice of the true nature of the charges against him, the first and most universally recognized requirement of due process."

The conflict between even the Trial Court and the Appellee as to what is and what is not obscene and the degree of obscenity call to mind the words of Time Magazine (December 9, 1946) discussing the *Doubleday and Company* case cited in our opening brief: "It proves . . . that finding a yardstick for proving a . . . book indecent is as difficult as weighing a pound of waltzing mice."

Respectfully submitted, Brock, Easton & Fleishman,
By Stanley Fleishman, Attorneys for Defendant.

[fol. 81] Affidavit of Service by Mail—(Omitted in printing)

[fol. 82] [File endorsement omitted.]

In the Appellate Department of the Superior Court, County of Los Angeles, State of California

Superior Court No. CR A 3350

Trial Court No. M-2360

People of the State of California, Plaintiff and Respondent

vs.

David S. Alberts, Defendant and Appellant

Appeal by defendant from a judgment and an order of the Municipal Court of Beverly Hills Judicial District, Charles J. Griffin, Judge. Affirmed.

For Appellants: C. Richard Maddox, Esq. & Stanley Fleishman, Esq.

For Respondent: S. Ernest Roll, District Attorney Jere J. Sullivan, Deputy District Attorney.

Amicus Curiae: A. L. Wirin, Esq.

Opinion—December 29, 1955

The defendant was convicted on two charges based on section 311 of the Penal Code: that he had lewdly kept for sale obscene and indecent books; and that he had lewdly written, composed, and published an advertisement of them. A new trial was denied, and a sentence (its terms not divulged) was imposed. The appeal is from the order and judgment.

Section 311, Penal Code, declares a large number of acts, if lewdly done, to be a misdemeanor. Subdivision 3 of the section alone lists some nineteen of these acts, and in the

first count of the complaint it was charged that the defend-[fol. 83] ant had done all of them. Whatever may be said about the possibility that one who swears to such a complaint is guilty of perjury (for there was not the slightest proof that the defendant had committed most of the acts charged), and that a decent regard to fair play would dictate that some attempt be made to have the charge fit the known facts, it is not legal error to charge them all in one count. (See *People* v. *McGlennegen* (1925), 195 Cal. 445, 452, 234 P. 91; *Bealmear* v. *So. Calif. Edison Co.* (1943), 22 Cal. 2d 337, 340-343, 139 P. 2d 20, 22-23; *People* v. *Rosenbloom* (1931), 119 Cal. App. (Supp.) 759, 762, 2 P. 2d 228, 230; and *People* v. *Allington* (1954), 103 Cal. App. 2d (Supp.) 911, 914-919, 229 P. 2d 495, 497-500.)

Two other facts support our conclusion that a reversal should not be had because of the shot-gun character of pleading. The first is, that even if it were error to charge the many acts with reference to many things, with no expectation of proving but a few of them, no attack was made upon the complaint by demurrer, as may now be done. (Section 1004, Penal Code.) Moreover, while the type of pleading being considered lends itself to an unfair prosecution, actually, in this case, the defendant was not prejudiced; he would have been no better off had the charge been simply that he kept obscene books for sale.

The words "obscene and indecent" as used in subdivision 3 of section 311, are not unconstitutionally indefinite. As early as 1896 the United States Supreme Court knew their meaning. (*Swearingen* v. *U.S.* (1896), 161 U.S. 446, 451, 40 L. ed. 765, 766), and a large number of cases since then have been decided on the theory that their meaning was not obscure. (See Annotation, 76 A.L.R. 1099, and *People* v. *Wepplo* (1947), 78 Cal. App. 2d (Supp.) 959, 961, 178 P. 2d 853, 855.) To be sure, it is not always easy to decide on which side of the line a book should be placed, but if a difficulty of that sort sufficed to condemn a statute, then we could not declare it to be a crime to drive while [fol. 84] under the influence of liquor, or to induce a person to part with his property by a false pretense, or to kill with malice aforethought.

The circumstance that the defendant made use of the United States mails to advertise and to distribute his ob-

scene wares—and that some of his books were obscene we do not consider debatable—does not render the state statute (section 311) inoperative. (See *In re Phoedovius* (1918), 177 Cal. 238, 246, 170 Pac. 412; *Zinn v. State* (1908), 88 Ark. 273, 114 S.W. 227, 228; *Exparte Williams* (1940), 345 Mo. 1121, 139 S.W. 2d 485, 491 [which cites *In re Phoedovius, supra*; certiorari denied in *U.S. Supreme Court*, 311 U.S. 675, 85 L. ed. 434); *Railway Mail Ass'n v. Corsi* (1945), 326 U.S. 88, 95, 89 L. ed. 2072, 2077.)

We see no good purpose to be served by a discussion of either the evidence, which we find sufficient to support the judgment, or of the other contentions advanced.

The order and judgment appealed from are affirmed.

Dated December 29, 1955.

Bishop, Judge.

We concur.

Shaw, Presiding Judge, ——, Judge.

[fols. 85-97] In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles

Superior Court No. CR A 3350

Trial Court No. M-2360

On Appeal from the Municipal Court of the Beverly Hills Judicial District, County of Los Angeles, State of California.

People of the State of California, Plaintiff and Respondent

vs.

David S. Alberts, Defendant and Appellant

Judgment—Filed December 29, 1955

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ordered and adjudged that the order and judgment appealed from, made and entered in the Municipal Court

of the Beverly Hills Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

[fol. 98] [File endorsement omitted]

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

ORDER AND MEMORANDUM DENYING REHEARING January 12, 1956

The petition of appellant for a rehearing after judgment of this court on appeal, in the above entitled matter, having been filed, and having been duly considered,

Said petition is hereby denied.

Memo

In his petition for a rehearing, the defendant reveals that he shares a misunderstanding of the duty resting upon this Department, with respect to the writing of opinions, that is so widely held that it calls for a comment. Referring to the pronounced silence in our opinion, on a proposition he had argued, the defendant stated: "a proper consideration for the parties and this Court's duty to declare the law would seem to require some comment on the question posed."

Throughout the past twenty-five years, "this court" has recognized a duty "to declare the law" in only a very limited number of cases. To begin with, the requirement [fol. 99] of Article VI, section 24, of the State Constitution, that "all decisions of the Supreme Court and of the district courts of appeal shall be given in writing, and the grounds of the decision shall be stated" obviously does not apply to us. Moreover, Rule 6, of the rules adopted by the Judicial Council for the government of appellate departments, declares that "The judges of the Appellate Department shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest."

We sympathize with the desire of counsel, who have car-

nestly argued a question, to have us explain how we arrived at an adverse answer. The number of cases that come before us is so great, however, that, as a rule, we cannot gratify the understandable desire of counsel, for writing an opinion often takes more time than arriving at it. Our system of conference, before and after the call of the calendar, reduces to near the vanishing point the danger of one-man decisions, or decisions made without considering the points and authorities advanced.

Now and then a case comes before us involving a question that is little likely to be solved, at any early time, by either the Supreme Court or one of the district courts of appeal, but which will frequently reappear before the more than eighty municipal court judges whose judgments come to us on appeal. Examples readily come to mind: the unlawful detainer actions under the rent regulations; violations of a newly created offense punishable only as a misdemeanor. In this class of cases we recognize a duty "to declare the law." Even in such cases we feel under no duty to comment on every contention that may be made. We do not believe that we should follow practices that add unnecessarily to the number of law books that the profession must buy and provide shelves to house.

[fols. 100-101] Dated January 12, 1956.

By the Court. Bishop, Presiding Judge, —— Judge, —— ——, Judge.

[fols. 102-105] In the Municipal Court of Beverly Hills Judicial District, County of Los Angeles, State of California

Before Hon. Charles J. Griffin, Judge.

[Title omitted]

Reporter's Transcript on Appeal—June 9 and 10, 1955

Appearances of Counsel:

For the People: S. Ernest Roll, District Attorney, By: James F. Nelson, Deputy District Attorney, 6th Floor, Hall of Justice, Los Angeles 12, California.

For the Defendants: C. Richard Maddox, Esq., 9441 Wilshire Blvd., Suite 426, Beverly Hills, California. (BRadshaw 2-5785).

[fol. 106] Beverly Hills, California, Thursday, June 9, 1955, 9:30 A. M.

The Court: People versus David S. Alberts and Violet E. Alberts.

Mr. Maddox: Ready for the defendants, your Honor.

Mr. Nelson: The people are ready, your Honor.

The Court: All right, gentlemen, you may proceed.

Mr. Nelson: Sergeant Frank W. Bridges, please.

FRANK W. BRIDGES, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Frank W. Bridges.

Direct examination.

By Mr. Nelson:

Q. What is your occupation, Mr. Bridges?

A. Deputy sheriff, Los Angeles County, attached to the Vice Detail.

Q. You are one of the investigating officers in this case?

A. I am.

Q. Directing your attention to February 25, 1955, Mr. Bridges, did a portion of your investigation take place on [fol. 107] that day?

A. Yes, sir, it did.

Q. Where was this investigation conducted?

A. At 8733 Santa Monica Boulevard.

Q. Did you go to that location on February 25, 1955?

A. I did.

Q. Before you went to that location had your procured a search warrant for such address?

A. Yes, sir, I had.

Q. And where was that procured and on what date, sir?

A. On the same date, the 25th of February, 1955, from the District Attorney's office, and subsequently from the Beverly Hills Municipal Court.

Q. Would you tell the court now the circumstances surrounding your investigation on the 25th of February at this address on Santa Monica Boulevard?

A. I proceeded to the location together with other deputy sheriffs, Los Angeles police officers, and representatives from the District Attorney's office. I arrived at the location at approximately 11:00 a. m.

At approximately 1:00 p. m. Mrs. Alberts came to the location. I gave her a copy of the search warrant, and she admitted myself and the other officers into the location.

Q. At that time was a search conducted of those premises?

A. Yes, sir, it was.

[fol. 108] Q. Would you describe the premises as you found them on the inside and on the outside?

A. The location is a one-story garage-type structure. It contains, inside, a number of racks and shelves and additional paraphernalia.

The Court: Pardon me. Do you want a blackboard on this?

Mr. Nelson: I don't think it is necessary, your Honor. All we need is a vague description.

Q. What did you observe, if anything, on these racks and shelves, Sergeant Bridges?

A. Numerous books, pictures, and stereo slides, together with other material.

Mr. Nelson: Your Honor, I have a bundle of what appear to be small booklets, approximately 3 inches by 4½ inches in size, and which bear the titles:

1. Ballad of a Nun and Other Poems.
2. Homosexual Life.
3. Letters of the Courtesans.
4. How To Be Married Though Happy or How To Be Happy Though Married.
5. The Prostitute and Her Lover.
6. The Love Affair of a Priest and a Nun.
7. Amorous Tales of the Monks.
8. Wild Women of Broadway.
9. Strange Marriage Customs.

[fol. 109] 10. Confessions of a Minister's Daughter.

11. The Fleece of Gold.

I think, in view of the fact that there will probably be numerous exhibits, your Honor, if these may be accepted as People's Exhibit 1 it will probably be more convenient.

The Court: They may be received as one exhibit for the People for identification.

Mr. Nelson: For identification, yes.

Q. I show you People's Exhibit 1 for identification, Sergeant Bridges. Did you see those booklets or booklets similar to that on that occasion?

A. Yes, sir, I did.

Q. Were they located upon the shelving at the address on Santa Monica Boulevard?

A. Yes, they were. I identify them by my initials and the address of the location, placed on each booklet.

Q. And those booklets now bear that identification mark, is that correct?

A. Yes, sir, they do.

Q. At the time you discovered these booklets were either of the defendants present?

A. Yes, Mrs. Alberts.

Q. Now, by "Mrs. Alberts" do you mean the lady at the end of the counsel table?

A. Yes, sir, I do.

Q. A defendant in this case?

[fol. 110] A. Yes, sir.

Mr. Nelson: Your Honor, I have now what appears to be an advertising brochure printed in black upon a white paper with a pink border. May this be marked People's Exhibit 2 for identification?

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 2, Sergeant Bridges. Have you seen that or a similar brochure to that before?

A. Yes, sir, I have.

Q. Did you find that brochure or one similar to that in the address at Santa Monica Boulevard on the 25th of February 1955?

A. Yes, sir, I did. I identify it again by my initials and the location, placed on the front portion thereof.

Mr. Nelson: Your Honor, I have now another of what appears to be another sales brochure which is printed in black on yellow paper. May it be marked People's Exhibit 3 for identification?

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 3, Sergeant Bridges, and ask you, have you seen that or a similar brochure before?

A. Yes, sir, I have.

Q. Did you see that upon the occasion of February 25th [fol. 111] at the address 8733 Santa Monica Boulevard?

A. Yes, sir, I did.

Mr. Nelson: Your Honor, I have now a packet of a series of pictures entitled "Tina's Torture" placed on photographic print paper approximately the size of 3½ inches by 11½ inches. May this be marked People's Exhibit 4 for identification.

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 4, Sergeant Bridges. Have you seen that particular sequence of pictures before?

A. Yes, sir, I have.

Q. Did you find that sequence or a similar sequence to be at the location on Santa Monica Boulevard on the occasion of this search?

A. Yes, sir; I did.

Mr. Nelson: Your Honor, I now hold in my hand a series of eight larger booklets, being approximately 5½ by 8 inches in dimensions, which bear the following titles:

Petting as an Erotic Exercise.

Bestiality and the Law.

Male Homosexuals Tell Their Stories.

The Business Side of the Oldest Business.

Questions and Answers About Orageinital Contacts.

The Picture of Conjugal Love.

William Heirens—Notorious Sex Maniac.

[fol. 112] Female Homosexuals—Lesbians Tell Their Stories.

Bestiality in Ancient and Modern Times.

May these eight booklets be combined as People's Exhibit 5 for identification?

The Court: They may be so makred.

By Mr. Nelson:

Q. I show you now People's Exhibit 5, Sergeant Bridges. Have you seen those booklets before, or booklets similar to them?

A. Yes, sir, I have.

Q. Did you see them upon the above occasion at the address on Santa Monica Boulevard?

A. Yes, sir, I did.

Mr. Nelson: Your Honor, I now have 20 packets of pictures approximately 3 inches by 4 inches in size, which are identified by a picture of girls tied in what appears to be a dental or barber chair. May these 20 packets of pictures be marked People's Exhibit 6 for identification?

The Court: They may be so marked.

By Mr. Nelson:

Q. Will you examine People's Exhibit 6 for identification, please, Sergeant Bridges? Do you recognize those pictures, sir?

A. Yes, sir, I do.

Q. Are they the pictures or similar pictures to those you found on Santa Monica Boulevard at 8733 on the 25th day of February 1955?

A. Yes, sir, they are.

[fol. 113] Q. Directing your attention now to all of the exhibits which have thus far been placed before you on the table, were there more than one copy of these exhibits, which you see exemplified there, in the location on Santa Monica Boulevard?

A. Yes, sir, there were. We took in each instance six copies of each one of the individual exhibits.

Q. Are you able to state whether or not there are five duplicates at least of each of the exhibits which appear before you on the table now?

A. Yes, sir, I am.

Q. Is there?

A. Yes, sir, there is.

Q. As these items were taken, Sergeant Bridges, what was done with them?

A. In each instance, as each individual item was taken from the racks or the shelves, the name of the booklet or series of pictures was read aloud together with the identification number on each in most instances, and in each instance Officer Barnes or Deputy Greenleaf made a recordation of each side. These recordations were subsequently signed by myself and the other officers, and a copy of same was given to the defendant, Mrs. Violet Alberts.

Mr. Nelson: Your Honor, at this time I have three small packets of gummed-back labels which appear to be for the [Vol. 114] purpose of placing on a mailed enveiope. One is labeled, "Initial S Shop, Box 46946, West Hollywood 46, California."

Another is labeled, "From Sailor Jock's Club, 8923 Sunset Strip, Los Angeles 46, California."

The third is labeled, "This parcel may be opened if necessary. Male Merchandise Mart, Hollywood 46, California. Contents Merchandise Books."

May these three packets of labels be marked People's Exhibit 7 for identification.

The Court: They may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 7, Sergeant Bridges. Have you seen these labels or labels similar to them before?

A. Yes, sir, I have.

Q. Did you see these labels or similar labels on the occasion at 8733 Santa Monica Boulevard pursuant to a search of that location on February 25, 1955?

A. Yes, sir, I did.

Mr. Nelson: You may cross-examine.

Cross Examination.

By Mr. Maddox:

Q. Sergeant Bridges, you stated you arrived at the Santa Monica address at about 11:00 o'clock, and you met Mrs.

Alberts, one of the co-defendants, at about 1:00 o'clock. What time did you leave the Santa Monica address?

[fol. 115] A. My best recollection would be approximately four or five that afternoon or that evening.

Q. During that time you and the other officers were making an inspection of the premises and, as you have described, these articles on shelves, is that right?

A. Yes, sir, that's correct.

Q. How many officers were there making this inspection?

A. Initially there were, I believe, five.

Q. And you five officers worked continually then, from eleven to four, making an inspection and then ultimately, taking these particular articles and removing them from the premises, is that right?

A. Yes, sir. Those articles together with additional articles and copies of each.

Q. I believe you testified that you took six or three or a certain number of each one of these items. That's what you mean by saying "additional items," isn't that right?

A. Yes, partially. Six of each of the articles in identification today, together with six of additional items, six copies of additional items that aren't presented today as yet.

Q. Then, as I understand your testimony, there are six other additional items that you found in the premises that are not being identified now for evidentiary purposes, is [fol. 116] that right?

A. No, sir.

Q. Well, then, I'll put it this way: Have you told us here about all the exhibits that you took from the premises?

A. No, sir.

Q. There are more, is that right?

A. Yes, sir, that is correct.

Q. What are the other exhibits?

A. Additional books, pamphlets, stereo slides, and pictures.

Q. Have you any way of telling us here approximately the number of items you removed from the warehouse, just generally?

A. No, sir. It would be quite a large amount. I couldn't make a positive state a positive number. I would say

it would be in the hundreds or possibly thousands, taking into consideration that there would be six of each individual item.

Q. You took them away in automobiles and a small truck, is that correct?

A. Yes, sir, that's correct.

Q. Could you describe in somewhat more detail the inside of the premises there designated as a warehouse, and how large it was? Can you tell us about that?

A. Yes, sir. My best estimate would be that it is ap- [fol. 117] proximately 25 by 50 feet in width and length. There is a rack or shelves along the east wall, I believe the south wall, and the west wall. This rack extends approximately two-thirds of the way through the length of the building. In the center and southern portion of the building additional racks and shelving, possibly three, I believe, in number. On the north end there were several mailbags. Just to the south of that, I believe, were two desks, one on the west and one on the east side of the room, and some boxes and packages. But my best recollection is that that is the inside of the building together with the dimensions.

Q. Can you tell us, excepting what you have already told us about these exhibits that have been offered here for identification, what other general merchandise did you find in the warehouse?

A. Just similar-type books, pamphlets, slides, and pictures.

Q. Did you find any novelties?

Do you know what I mean by "novelties"?

A. Yes, sir. Yes, sir, I did.

Q. What were those novelties that you found?

A. My best recollection of those novelties was one of them to be several small figurines of a hula girl. They were hula-girl type figurines. I don't have a recollection of the other novelties.

Q. Did you take any of the novelties with you as ex- [fol. 118] hibits or did you remove them from the warehouse, that is, any of the novelties?

A. Yes, sir, we removed six of each of the novelties.

Mr. Maddox: I see. I have no further questions.

The Court: Any redirect?

Redirect Examination.

By Mr. Nelson:

Q. Sergeant Bridges, you spoke of some hula-girl figurines.

A. Yes, sir.

Mr. Nelson: Your Honor, I have here what appears to be another sales brochure, printed in dark green on white and approximately 8½ inches by 24 inches. May it be marked People's exhibit next for identification?

The Court: It may be marked People's Exhibit 8 for identification.

By Mr. Nelson:

Q. You speak of hula-girl figurines, Sergeant Bridges. Would you examine People's Exhibit 8 and see if there is on there a representation of what you found at the location on Santa Monica Boulevard?

Mr. Maddox: I object to that, if the court please, as calling for a conclusion of this witness as to the fact that he is stating that on that particular brochure he is now giving an opinion as to whether it is the same as one that he found in the premises.

[fol. 119] Mr. Nelson: I don't think that is subject to expert testimony, your Honor.

The Court: Well, he can give a statement as to whether or not there is any drawing or photograph on there which is similar to the figurines that he removed.

Mr. Maddox: Well, he might state whether it is a description of a figurine, but whether or not it is the same is a question to be determined by the court and not by this witness.

The Court: I don't know what is in there. I haven't seen it. But if there is a photograph of something which in his opinion is similar to the figurine, he can so state.

Mr. Maddox: Very well, your Honor.

The Court: The objection is overruled.

A. Yes, sir, there is a photograph similar to one of the figurines that we took from the location.

By Mr. Nelson:

Q. Would you indicate upon the brochure which photograph you are telling us about, Sergeant Bridges?

A. It appears in the middle of the—the bottom of the middle of the page that I am looking at, in the lower portion.

Q. And you are referring to a portion that is described on this paper as "Learn Nancy's Secret. Naughty Nancy," is that correct?

A. Yes, sir.

[fol. 120] Q. Incidentally, Sergeant Bridges, have you seen a brochure similar to this one, this green on white that is in front of you now as People's Exhibit 8?

A. Yes, sir, I have.

Q. Did you see any on the above location?

A. Yes, sir, I did.

Q. That is, on Santa Monica Boulevard on the 25th of February pursuant to a search?

A. Yes, sir.

Q. And were some of those taken also?

A. Yes, sir, they were.

Q. How many?

A. I don't recall.

Q. More than one?

A. More than one, yes.

Q. You mentioned on cross examination that duplications of certain articles were taken. Did you take any articles from this warehouse that were not duplicates?

A. I don't recall them doing so, sir.

Q. I am not referring particularly to the books, pamphlets, etc., but any other items such as mailing lists or work records or anything of that nature from that location?

A. Yes, sir, I believe there were several mailing lists that were not in duplicate that were taken from the location on the 25th of February.

[fol. 121] Mr. Nelson: No further questions.

Mr. Maddox: No further questions.

The Court: That is all.

Mr. Maddox: This witness may be excused unless you desire to have him remain.

Mr. Nelson: I think he would just as soon remain.

STIPULATION AS TO TESTIMONY OF P. I. BARNES

At this time, counsel, may it be stipulated that P. I. Barnes of the Los Angeles Police Department, Administrative Vice Detail, be deemed to have been sworn and to have testified substantially and essentially the same as Sergeant Frank W. Bridges, the witness who just left the stand?

Mr. Maddox: I understand that P. I. Barnes is an officer with the L. A. Vice Detail of the Los Angeles Police Department.

Mr. Nelson: Yes, who participated in the search of the 8733 Santa Monica Boulevard address.

Mr. Maddox: Well, I will stipulate that if he were called he would testify substantially as Sergeant Bridges has.

Mr. Nelson: I don't mean to be overly technical, but I would prefer to have the stipulation read that it be deemed that he has been called, sworn, and so testified.

Mr. Maddox: Yes.

The Court: Do you so stipulate?

Mr. Maddox: Yes.

Mr. Nelson: Sergeant Russell Gardner, please.

[fol. 122] RUSSELL GARDNER, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Russell Gardner.

Direct examination.

By Mr. Nelson:

Q. What is your occupation, Mr. Gardner?

A. Deputy sheriff of Los Angeles County attached to the Vice Detail.

Q. You are one of the investigating officers in this case, sir?

A. I am.

Q. When and where did your investigation of this matter take place?

A. At approximately 11:00 o'clock a. m. on the 25th of February at 8627 Melrose Boulvard.

Q. What is located at that address, sir?

A. That is a single-story commercial-type building in a commercial area.

Q. Does it have a name or other designation, other than the street number?

A. Not as I recall. It consists of a door fronting on the street. The building was divided into two portions, the [fol. 123] front portion consisting of an office containing various cabinets and files and desks, and the rear portion of the building consisting of approximately three-quarters of the length of the building.

Q. Mr. Gardner, will you examine People's Exhibit 8 for identification, which is on the desk in front of you?

A. Yes.

Q. Have you seen that or one similar to it before?

A. Yes, I have.

Q. Similar to that brochure?

A. I have.

Q. Did you find that brochure or one similar to that in the location on Melrose Avenue?

A. I did.

Q. Will you describe the inside of this address on Melrose as you observed it on that occasion?

A. Yes. The front portion of the building consisted of an office space containing two desks and various filing cabinets. It was separated from the rear of the building by a partition which had an open door entering the back of the building, which consisted of approximately three-quarters of the building, which was, I would say, 20 feet in width by 60 feet in depth, and which contained various types of machinery such as typewriters, addressing machines, mailbags, and it also contained numerous brochures of this nature that I have already described here.

[fol. 124] There were at the time six women in the rear portion of the building busy typing addresses from an address list onto envelopes which contained these various brochures.

In addition to the brochures there were various books, records, mailing lists, and various other pamphlets at the location.

Q. Were there any shelves or anything for the storage of these materials?.

A. There were.

Q. How did you gain entry to this location?

A. The front door was open. I walked into the front door and proceeded to the rear portion of the building.

Q. Did you encounter someone therein?

A. I did.

Q. Were you asked for a search warrant?

A. Not at that time, no.

Q. Did you have a search warrant?

A. I did.

Q. At the time you entered the building on Melrose were either of the defendants, either David Alberts or Violet Alberts, on the premises?

A. Not at that time, no.

Q. Did they arrive on the premises later?

A. They did.

Q. Which one of them, or both?

A. Mrs. Alberts arrived at the premises subsequent to [fol. 125] my arrival.

Mr. Nelson: Your Honor, I have six books which are bound volumes approximately 5 inches by 8½ inches in size, titled as follows:

To Beg I Am Ashamed.
Witch on Wheels.
The Pleasures of the Torture Chamber.
Snow Job.
She Made It Pay.
Sword of Desire.

May these six books combined be marked People's Exhibit 9 for identification?

The Court: They may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 9 and the books which make it up. Have you seen them before, Sergeant Gardner?

A. Yes, I have.

Q. Where did you see those books?

A. Those books were recovered from the cabinet that was in the front portion of the location.

Q. Were duplicates of those books taken?

A. No, they were not. These were individual copies that were confiscated.

Mr. Maddox: I didn't hear that.

The Witness: They were individual copies that were confiscated.

[fol. 126] Mr. Nelson: Your Honor, I have ten issues of what appears to be a small magazine, 5 by 8½ inches in size, entitled "Good Times." May these ten issues be marked People's Exhibit 10 for identification?

The Court: They may be so marked.

By Mr. Nelson:

Q. I show you these magazines, Sergeant Gardner, and ask you, have you seen them before?

A. I have.

Q. Did you see them on the occasion of your search of the Melrose location?

A. I did.

Q. Are you able to state whether those are individual copies or duplicates of the property seized?

A. These are individual copies consisting of a series of volumes.

Q. In other words, there are more than this series of magazines?

A. That's correct.

Q. Directing your attention to the books in People's Exhibit 9 for identification, in the book entitled "Sword of Desire" there appears to be protruding from the book a yellow slip of paper. Did you notice that yellow slip of paper in any of the books?

A. Yes. This was in the books.

Q. And this slip of paper which is included now in People's Exhibit 9 says, "Important Notice: Due to circum-[fol. 127] stances beyond our control it was necessary to make a substitution in your order. When we do so we al-

ways substitute an item of more select nature. We have done so in this case."

Was the wording of that—do you recall that as being the wording of that yellow notice when you first saw it?

A. I do.

Mr. Maddox: Counsel, may I ask here: The yellow slip that you are just referring to, are you making that a part of that Exhibit 9, or do you want to make it a separate exhibit?

Mr. Nelson: Perhaps I should ask another preliminary question before we decide, counsel.

Q. Sergeant Gardner, do you recall whether or not that yellow slip was found in each of these books?

A. No, I don't recall finding it in each of the books. However, it was in this one book you referred to.

Mr. Nelson: Perhaps, with your Honor's permission, we should make the yellow slip People's Exhibit 9-A for identification unless that is confusing to the clerk and the court.

The Court: No. Or else withdraw that from Exhibit 9 and make that yellow slip Exhibit 10 separately. He says he only found that slip in one book, is that correct?

Mr. Nelson: Yes. We could very well withdraw this.

The Court: Make that a separate exhibit with the [fol. 128] yellow——

Mr. Nelson: May the People withdraw the book entitled "Sword of Desire," containing a yellow slip?

The Court: That leaves five books.

Mr. Nelson: And may the "Sword of Desire" and the yellow slip be made People's Exhibit 11 for identification?

The Court: It may be so marked.

Mr. Nelson: Your Honor, I have a box containing a stereo-viewer, containing 13 stereo-slides. May this be marked People's Exhibit 12 for identification?

The Court: It will be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 12, Sergeant Gardner. Will you examine it, please?

A. (Witness complies.)

Q. Have you seen that exhibit before, sir?

A. I have.

Q. Are you able to state whether or not each of the stereo-slides that appears in that box was in the Melrose location at the time you made the search?

A. Yes, all these slides were in the location when I made the search.

Q. Were there other boxes of slides in the location?

A. There were.

Q. Are these slides duplicates of slides that appeared in those other boxes?

A. Yes, sir.

[fol. 129] Q. Did you seize, under the search warrant, duplicates of these slides?

A. I did.

Mr. Nelson: Your Honor, I have an envelope containing what appears to be a comic strip printed on film print paper, approximately 4 by 10 inches in diameter, and consisting of several sequence sheets, entitled "Madame Olga's Recruits," and also in the envelope what appear to be negatives for the positive prints. May the envelope and its contents be marked People's Exhibit 13 for identification?

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 13 for identification, Sergeant Gardner. Did you find that on February 25, 1955?

A. I did.

Q. Where did you find it?

A. This was in a locker that was in the rear portion of the building at the location.

Mr. Nelson: Your Honor, I have another envelope containing what appear to be four photographs to a sheet, and several sheets, in which appear one or more girls. May these be marked—rather, may this envelope and its contents be marked People's Exhibit 14 for identification?

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 14, Sergeant Gardner, [fol. 130] Would you examine that, please, and tell us if you have seen that exhibit before?

A. I have.

Mr. Nelson: Your Honor, I have an envelope containing what appear to be negatives, six negatives to one sheet, and the cut versions of the positive prints of those negatives, in which appear the figure or figures of girls or women. May the exhibit be marked People's Exhibit 15 for identification?

The Court: It will be so marked.

By Mr. Nelson:

Q. Sergeant Gardner, would you examine People's Exhibit 15, please?

A. Yes.

Q. Have you seen it before?

A. I have.

Q. When and where?

A. At the location where it was seized on the 25th of February 1955.

Mr. Nelson: Your Honor, I have another envelope which contains a negative—six negatives to a page, and the pictures which appear as positive prints of the negatives, in which appear two women; one of whom appears to be strapped in a barber's chair. May this envelope and its contents be marked People's Exhibit 16 for identification?

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 16, Sergeant Gardner, [fol. 131] and ask you if you have seen it before.

A. I have.

Q. When and where?

A. At 8627 Melrose on the 25th of February 1955.

Q. At the time you made this search, Sergeant Gardner, were you in the company of Los Angeles Police Department officers?

A. Yes, sir.

Q. And any members of the District Attorney's investigators?

A. Yes, sir, there was a representative of the District Attorney's office there.

Q. Was Officer Richard Collins of the Los Angeles Police Department present?

A. He was.

Q. What was done with these exhibits that you have testified to, as they were taken from the location?

A. As they were confiscated, the description——

Mr. Maddox: Counsel, possibly to assist you, I will make a stipulation concerning that particular subject matter, if it will help.

Mr. Nelson: Very well.

Mr. Maddox: And that will apply in each one of these instances of a witness testifying, if it will help, that the material was taken in due course, a receipt was given, and it was transported to the District Attorney's office or [fol. 132] Sheriff's office. Is that what you would like?

Mr. Nelson: That's right, where it was kept for safekeeping until this day.

Mr. Maddox: I will make a stipulation to that effect. And will you designate such witnesses who will so testify?

Mr. Nelson: Very well. The People will accept such a stipulation.

The Court: So stipulated.

Mr. Nelson: You may cross-examine.

Cross-examination.

By Mr. Maddox:

Q. Sergeant Gardner, you stated that you went into the office. I believe you described the premises as an office, is that right?

A. The front portion of the premises was an office, yes.

Q. And you say that you found these five books that are bound and that are designated as Exhibit 9. Where did you find those books?

A. They were in a cabinet that was on the west portion of the wall of the office in the front of the building.

Q. Was that cabinet locked or unlocked?

A. It was locked, but subsequently it was unlocked.

Q. Who unlocked it?

A. Mrs. Alberts.

[fol. 133] Q. In other words, you asked her for the key, and she gave you the key, and you unlocked it, is that correct?

A. No, that is not correct.

Q. Anyway, it was unlocked by someone, is that right?

A. Yes.

Q. And that is where you found the five books?

A. Yes.

Q. Now, the ten "Good Times" magazines, where did you find them?

A. As I recall, they were in the same cabinet.

Q. And the stereo-viewer and slides, where did you find them?

A. That was in the cabinet also.

Q. On the premises did you find any further material such as these same books or other books or other stereo-slides?

A. No. As I testified, this was the only individual copies of these bound books that were found.

Q. I see.

Mr. Maddox: I have no further questions.

The Court: Any redirect?

Mr. Nelson: Nothing further.

H. B. Cains.

HANK B. CAINS, called as a witness on behalf of the [fol. 134] People, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Hank B. Cains.

Direct examination.

By Mr. Nelson:

Q. Where do you live, Mr. Cains?

A. 9928 Durant Drive, Beverly Hills.

Q. What is your business or occupation?

A. Builder.
Q. What is the address of your place of business?
A. 8731 Santa Monica Boulevard.
Q. What is located at that address?
A. Our office, warehouse, and parking lot.
Q. Are you the landlord of the address at 8733 Santa Monica Boulevard, sir?
A. I am the master lessee.
Q. You hold the master lease on this property?
A. Yes, sir.
Q. Do you know the defendant David S. Alberts?
A. Yes, sir.
Q. Do you know him as the tenant under you of that location?
A. Yes, sir.
Q. Have you accepted rent from Mr. Alberts for this location?
[fol. 135] A. Yes, sir.
Q. Do you know the co-defendant Violet Alberts?
A. Yes, sir.
Q. Have you seen her on those premises?
A. Yes, sir.
Q. Have you ever accepted rent from her for those premises?
A. Yes, sir.

Mr. Nelson: No further questions.

Cross examination.

By Mr. Maddox:

Q. Do you have a lease, Mr. Cains?
A. Yes, sir.
Q. A written lease?
A. Yes, sir.
Q. And do you have that with you?
A. No, sir.
Q. In whose name do you rent the premises as tenants?
A. I rent it under E. R. Enterprise.
Q. E. R. Enterprise?
A. I think that's the name—Company.
Q. Do you know whether or not that is a corporation?

A. No, sir, I believe it is a company.

Q. You don't know how it is designated on the lease?

A. No, because when the checks come in for the rent [fol. 136] every month my bookkeeper enters them and sends them to the bank, and we only have a verbal one-year lease agreement.

Q. But you do have a written lease with this company, is that right?

A. No, sir.

Q. You don't have anything in writing, then, with this company that occupies this warehouse, is that right?

A. Well, the year before this present one-year lease there might have been some stipulation in writing as to the one-year lease that the company had with our corporation.

Q. Do any other persons pay you rent for this warehouse except David Alberts and Violet Alberts?

A. No, sir.

Q. In other words, no one else has ever given you any money?

A. No, sir.

Mr. Maddox: That is all.

Mr. Nelson: That is all. Nothing further.

The Court: That is all, Mr. Cains—unless you wish him to remain.

Mr. Maddox: The witness may be excused as far as the defense is concerned.

Mr. Nelson: May this witness be excused, your Honor.

The Court: Yes.

Mr. Nelson: Your Honor, at this time the People would like to call Sergeant Frank Bridges temporarily to the stand to clarify a point.

[fol. 137] The Court: Sergeant Bridges, will you come back to the stand, please?

Mr. Nelson: Will you take the stand again, Sergeant Bridges.

Frank W. Bridges, recalled as a witness on behalf of the People, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Nelson:

Q. Sergeant Bridges, I will now show you the five books which comprise People's Exhibit 9 for identification. Did you see copies of those books, or what appeared to be copies of those books, at the Santa Monica location?

A. Yes, sir, I did.

Q. The Santa Monica Boulevard location, that is?

A. Yes, sir.

Q. Approximately how many copies did you observe in the premises at that address on Santa Monica Boulevard?

A. More than six in each instance, as I recall.

Q. Did you take six copies of those books?

A. Yes, sir, I believe so.

Q. And were they delivered subsequently to the District Attorney's office for safekeeping?

A. Yes, sir, they were.

[fol. 138] Q. Was a copy of the inventory given to the person at the address?

Mr. Maddox: I will so stipulate.

By Mr. Nelson:

Q. And was a copy of the inventory deliverd to Judge Griffin as the magistrate who issued the search warrant?

A. Yes, sir, it was.

Q. Do you recall, sir, a book entitled "Sword of Desire"?

A. Yes, sir, I believe I do.

Q. Which is People's Exhibit 11 here, as I recall. I can't find it.

The Clerk: It is in the envelope right there.

By Mr. Nelson:

Q. I show you now People's Exhibit 11. Is that the book that I have called your attention to?

A. Yes, sir.

Q. "Sword of Desire"?

A. Yes, sir.

Q. Do you recall whether or not there were copies of this book in the Santa Monica address?

A. Yes, sir, I believe there were.

Q. Did you observe them on the occasion of the search?
A. I did.
Q. Approximately how many?
A. Six or more copies of each.
[fol. 139] Q. Were six copies taken from the location at 8733 Santa Monica Boulevard?
A. Yes, sir.

Mr. Nelson: No further questions.
Mr. Maddox: No further questions.
The Court: That is all.
The court will take a short recess.

(Short recess.)

The Court: You may proceed, gentlemen.
Mr. Nelson: Call Tanagra Regas.
Tanagra Regas, called as a witness on behalf of the People, having been first duly sworn, testified as follows:
The Clerk: Will you state your name, please?
The Witness: Tanagra Regas.

Direct examination.

By Mr. Nelson:

Q. Is it Miss or Mrs. Regas?
A. Mrs.
Q. Where do you live?
A. I live at 6144 Linforth Drive, Hollywood.
Q. Are you employed at this time?
A. Yes, I am.
Q. Where are you employed?
[fol. 140] A. At the Blue Cross Hospital Plan.
Q. What is the address there?
A. 4333 Wilshire Boulevard.
Q. In Los Angeles?
A. In Los Angeles.
Q. Mrs. Regas, do you know the defendants or either of them, Mr. or Mrs. Alberts?
A. Yes, I do.
Q. Do you know them both?
A. Yes, I do.
Q. Have you been in their employ?

A. Yes, I have.

Q. Where were you employed by them?

A. At 8627 Melrose Avenue.

Q. Does that address at 8627 Melrose Avenue have a title or a business name?

A. I believe there is a sign on the front reading "Paragon Enterprise."

Q. What was the nature of your duties there at that location?

A. I was employed as a file clerk.

Q. Were you assigned specific duties to perform there?

A. Yes, sir.

Q. What were they?

A. They were to file all cards in the filing cabinets, re- [fol. 141] move cards that were to be removed or killed; affix labels to cards that were to be sent to a typist; when the cards returned I was to file them in order again.

Q. Mrs. Regas, I will show you People's Exhibit 2 for identification, which is an advertising brochure. Do you recall having seen brochures of that type?

A. Yes, I have.

Q. At the location on Melrose Avenue?

A. That's right, I have.

Q. Did any of your duties concern something to be done with these?

A. Yes, they did.

Q. Do you know whether or not these were mailed from that location?

A. Yes, they were.

Q. Do you know whether or not the materials advertised in those brochures, to your knowledge, were located at the address on Melrose Avenue?

A. I would say no. Possibly there may have been some returns from the post office that were dumped in a box, but I had no contact with them.

Q. With the actual matters advertised in the brochures?

A. With the materials, right.

Q. How long were you employed at this address?

A. I was employed from November the 23rd, 1954, to [fol. 142] March 2, 1955.

Q. Does the name "Male Merchandise Mart" mean anything to you as a part of your employment?

A. Yes.

Q. Did you ever affix a gummed label to an envelope, which contained that notation "Male Merchandise Mart" Or did you ever use a return address from that location, "Male Merchandise Mart"?

A. Yes, sir.

Q. Does the nomenclature "Initial S Shop" or "Stagg Shop" mean anything to you as an employee of that concern?

A. Yes, I have seen that name there.

Q. Was that used as a return address upon envelopes mailed from that location?

A. Yes.

Q. Are you acquainted with the nomenclature "Sailor Jock's Club"?

A. Yes.

Q. Is that known to you to be a return address used on envelopes out of that location?

A. Yes.

Q. How many persons were employed at the time you were employed there on Melrose?

A. On Melrose?

Q. Yes.

A. Five.

[fol. 143] Q. Were you assigned duties concerning cards to be withdrawn from files for one reason or another?

A. Yes, sir.

Q. What was the method used to withdraw cards from their mailing files?

A. The method used was either applied to the envelope or to a letter that had been enclosed in an envelope, and the word "Remove" or "Kill" was written on it.

Q. How did you know which files were to be removed or killed?

A. Pardon?

Q. How did you know which to remove from the cabinets?

A. They were marked so.

Q. What were they marked upon?

A. On the letter or the envelope.

Q. On the letter. Now, what is this letter?

A. The letter addressed to the business.

Q. Did you receive letters at this address on——

A. No, I did not.

Q. Did you receive letters in your basket which appeared to be addressed to this location?

A. Right, yes.

Q. And it was then that you were to act upon these letters in some manner?

A. That is right.

[fol. 144] Q. Have you brought these letters that you have received with you?

A. I have brought two or three, yes.

Q. Were these letters placed in your basket for official action in the course of your business there?

A. That is right.

Q. Have you these letters with you now?

A. (Witness producing documents and handing same to counsel.)

Mr. Nelson: Your Honor, I have what appears to be a small note, in the upper left-hand corner of which is printed a name and address upon a gum-backed label, and this label stapled to the face of the letter. May this be marked People's Exhibit 17?

The Court: It will be marked People's Exhibit 17 for identification.

Mr. Nelson: For identification. Thank you.

Q. I show you People's Exhibit 17, Mrs. Regas. Is that one of the letters that you received to work upon there at the office on Melrose?

A. Yes, sir.

Q. Directing your attention now to the gummed label in the upper left-hand corner, what significance has that? Was that on the letter when you received it?

A. No, this was stapled to this letter. I had not seen the envelope.

[fol. 145] Q. In other words, that is as the letter came to you?

A. That is right.

Q. And what, if anything, did you do upon receipt of this letter?

A. I removed the name from the file.

Q. From whom was direction given to you to do this?

A. It was known to be my duty.

Q. From whom did you get your original direction?

A. My directions were from Mrs. Alberts.

Q. From Mrs. Alberts; that's Violet Alberts, the defendant in this case?

A. I know her as Evelyn.

Q. You know her as Evelyn?

A. Evelyn.

Q. And these other letters that you have brought with you were treated in the same manner as this letter?

A. That is right.

Q. As this letter which is People's Exhibit 17 for identification?

A. Yes, that is right.

Q. Were you on the premises on the date of February 25, 1955, Mrs. Regas?

A. Yes, I was.

Q. Were you there when the officers came in?

A. Yes, I was.

[fol. 146] Q. Did you observe them make a search of the premises?

A. Yes, I did.

Q. After the card had been removed from the file, what was to be done with the letters after this?

A. They were to be thrown in the wastebasket.

Q. And in this case you did not do so, is that correct?

A. I did not do so, no.

Q. And you have kept them in your possession until this date?

A. That is right.

Mr. Nelson: No further questions.

Mr. Maddox: No questions.

The Court: That is all, Mrs. Regas. You are excused.

Mr. Nelson: This witness may be excused, your Honor?

Mr. Maddox: There is no requirement of the defendants that she remain, and she may be excused.

The Witness: Do you leave this here?

Mr. Nelson: The one that is marked in evidence, you may, please, — or, rather, for identification, you may. These are yours and this one stays.

STIPULATION AS TO TESTIMONY OF RICHARD O. COLLINS

At this time, counsel, may it be stipulated that Officer Richard O. Collins of the ~~Los Angeles Police Department~~, Administrative Vice Division, be deemed to have been sworn and to have testified substantially as the testimony [fol. 147] of Sergeant Russell Gardner concerning the activities at 8627 Melrose Avenue on February 25, 1955?

Mr. Maddox: So stipulated.

Mr. Nelson: Robert Wallace, please

ROBERT J. WALLACE, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert J. Wallace.

Direct Examination.

By Mr. Nelson:

Q. What is your business or occupation, Mr. Wallace?

A. Deputy sheriff, Los Angeles County, attached to the Vice Detail.

Q. You are one of the investigating officers in this case?

A. I am, sir.

Q. Directing your attention to the 25th day of February 1955, did you proceed to an address in West Los Angeles on that day?

A. I did.

Q. What address?

A. 11064½ Strathmore Drive, sir.

Q. What is located at that address?

[fol. 148] A. It is a two-story multiple-dwelling unit, sir.

Q. Did you have a search warrant concerning the property located at that address?

A. I did, sir.

Q. Did you enter the apartment located there?

A. I did, sir.

Q. What, if anything, did you discover upon entry, sir?

A. Upon entering the apartment, the defendant Alberts was in the driveway upon my arrival, and he was shown a

copy of the search warrant. And he took us up to the front door of the apartment, and he said he did not have a key for the apartment, and he knocked on the door, and the defendant Mrs. Alberts was inside the apartment, and she let us in the apartment.

I explained to Mrs. Alberts that there were other officers at two other locations with search warrants similar to the ones that we had, and that the one location on Santa Monica Boulevard was locked and that we would like to have the location opened.

At that time Mrs. Alberts stated that she would open the location for us.

Q. Did she then leave the premises at Strathmore?

A. She did, sir.

Q. And you were there with other officers?

A. That is correct.

[fol. 149] Q. And Mr. Alberts remained there?

A. Mr. Alberts remained there. I personally transported Mrs. Alberts to the location on Melrose to secure keys for the Santa Monica address.

Q. Did you then return to the Strathmore address?

A. I did, sir.

Q. What transpired upon your rearrival at the Strathmore location?

A. Upon my return to the location on Strathmore Drive a search of the location had been in progress in my absence, and on my return I participated in a further search of the location there.

Q. Directing your attention to People's Exhibit 3 for identification, sir, did you find at that location a brochure the same or similar to that?

A. Similar to this, yes, sir.

Q. Directing your attention——

Mr. Nelson: Excuse me, your Honor. I have another brochure which is of the black on yellow variety. May it be marked People's Exhibit 18 for identification?

The Court: It may be so marked.

By Mr. Nelson:

Q. Directing your attention to People's Exhibit 18, sir, isn't it a fact that that is the brochure that you found at the Strathmore location?

A. Yes, sir, this is the brochure.

Mr. Nelson: Your Honor, I have what appears to be an [fol. 150] 8½-by-11 photograph of a woman. May it be marked People's Exhibit 19 for identification?

The Court: It will be so marked.

By Mr. Nelson:

Q. I show you People's Exhibit 19, Mr. Wallace. Have you seen a picture the same or similar to that?

A. I have, sir.

Mr. Maddox: Is that the one you showed me yesterday?

Mr. Nelson: Yes.

Q. Where was this picture when you saw it first?

A. Well, this picture, when I first saw it, was in the den portion of the apartment at 11064½ Strathmore Drive, sir.

Q. Did you again see that picture in the house?

A. I had a picture and a negative.

Q. You had a negative?

A. A negative of this picture, yes, sir.

Mr. Nelson: Your Honor, I have what appears to be a 4-by-5 negative of the picture which is People's Exhibit 19. May it be marked People's Exhibit 20 for identification, please?

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you this negative. Is that the negative to which you have reference, sir?

A. Yes, sir, that is the negative.

Q. Where was this negative found?

[fol. 151] A. This negative was found with the picture itself. The picture at the time I found it was the exact size as the negative here. However, the negative and the picture both were placed on a table in a dining area, and upon

my return to that area after I had placed the picture and the negative there, the picture itself was missing. However, the negative was still there.

Q. In the same location as previously?

A. In the same location, yes, sir.

Q. At the time this picture was placed upon the table in the dining area where was Mr. Alberts?

A. Mr. Alberts was in the front room, sir.

Q. After you placed the picture on the table in the dining area did you observe Mr. Alberts go through the dining area?

A. Mr. Alberts went through the dining area into the kitchen.

Q. Would you describe what you saw or heard as he went through the dining area into the kitchen?

A. Well, after he got into the kitchen, of course, I couldn't see him from my location, but I did hear the water in the sink being turned on, and a very short time thereafter the garbage dispose-all was turned on.

Q. What did you hear upon hearing the sound of the garbage dispose-all?

A. At that time I went immediately to the kitchen.

[fol. 152] Q. What, if anything, did you observe there?

A. I observed Mr. Alberts standing over the sink, with the garbage dispose-all on and the water turned on.

Q. And at this time was a search made for the print of the picture, the negative of which you have described?

A. At this time a very intensive search was made for the print, yes, sir.

Q. Were you able to locate it?

A. No, sir, I was not.

Q. Calling your attention again to People's Exhibit 19 for identification, this is a blown-up version or enlarged version of the picture that you originally saw?

A. That is correct, sir. The original print was approximately the size of this negative, and this negative was in a sheet that had three other negatives on it.

Q. That negative you are referring to is People's Exhibit 20 for identification?

A. Yes, sir.

Mr. Nelson: Your Honor, I have now four booklets, paper-bound volumes, one entitled "Padlocks and Girdles of Chastity"; one entitled "Straps and Stripes"; one entitled "Memoirs of a Spankee"; and one entitled "Slaves of the Lash."

May these four be marked People's Exhibit 21 for identification?

The Court: They will be marked People's Exhibit 21 for [fol. 153] identification.

Will you let me have that negative and also the large photograph?

The Witness: Yes, sir.

Mr. Nelson: I have also a small magazine-type pamphlet entitled "Unique for Lovers of the Unusual." May this be marked People's Exhibit 22 for identification?

The Court: It may be so marked.

Mr. Maddox: No. 22?

The Court: 22.

By Mr. Nelson:

Q. Directing your attention to these exhibits that I have shown you, 21 and 22, sir, have you seen them before?

A. Yes, sir.

Q. Did you find them in the house at that location?

A. I did, sir.

Q. Of any of these exhibits that you have testified to, 18 through 22, did you find duplicates?

A. Yes, there were duplicates.

Q. Of which items?

A. There were duplicates of—Let's see. This is People's Exhibit 21—duplicates of "Straps and Stripes," "Memoirs of a Spankee," and "Slaves of the Lash." There were duplicates of those books, sir, or those pamphlets.

Mr. Nelson: I have another photographic negative, your Honor, size 4 by 5. May this be marked People's Exhibit [fol. 154] 23 for identification?

The Court: It may be so marked.

By Mr. Nelson:

Q. I show you this negative, sir. Have you seen that before?

A. Yes, sir.

Q. Did you find that in the location on Strathmore?

A. Yes, sir, I did.

Q. Was there a print of that picture?

A. To the best of my knowledge the was a print, sir. I say "to the best of my knowledge there was a print," but I was unable to—yes, I was unable to produce the print.

Mr. Nelson: Counsel, may it be stipulated as per our original stipulation concerning the disposition of the evidence from the moment it was seized by this officer?

Mr. Maddox: So stipulated.

By Mr. Nelson:

Q. Now, in the course of your investigation, Mr. Wallace, did you visit all three locations that have been mentioned here today?

A. I did, yes, sir.

Q. The Strathmore address, the Melrose address, and the Santa Monica Boulevard address?

A. That is correct, sir.

Q. Are all three of these locations located in the County of Los Angeles?

A. In the county, yes, sir.

[fol. 155] Mr. Nelson: No further questions.

Cross-examination.

By Mr. Maddox:

Q. Sergeant Wallace, what time did you arrive at the Strathmore address?

A. At 11:00 o'clock, sir.

Q. What time did you leave?

A. I would say I left the first time at approximately 20 or 25 minutes after my arrival there, sir.

Q. Around 11:30?

A. Approximately that time, yes, sir.

Q. You came back again then, of course?

A. I came back again, yes, sir.

Q. When did you come back?

A. After I had left Mrs. Alberts off at the Santa Monica location.

Q. What time did you arrive the second time at the Strathmore address?

A. To the best of my recollection, sir, it would probably be around 12:30—between 12:30 and 1:00.

Q. And during your absence there were other officers there at the Stratmore address?

A. There were other officers present, yes, sir.

Q. What time did you leave the Strathmore address the second time that you left?

[fol. 156] A. I would say approximately 3:00 p. m.

Q. Well, you only left there once and then, when you left at 3:00 o'clock, you left finally, is that right?

A. That is correct, sir.

Q. During that time how many officers were at the Strathmore address?

A. I believe there was a total of four officers in the initial party at that location.

Q. So there were officers there from; let us say, 11:00 o'clock until 3:00 in the afternoon? We can say that generally?

A. I believe so, sir.

Q. And during the course of the time that the officers were there isn't it a fact that they were in the business or going about the business of searching the premises?

A. You mean during the entire period of time?

Q. Yes.

A. No, sir.

Mr. Nelson: Your Honor, I will object to that, inasmuch as it calls for a conclusion of this witness, and the witness was not present during the entire stay.

The Court: Objection sustained.

By Mr. Maddox:

Q. Well, at the time that you were there, Sergeant Wallace, what did you do while you were there?

A. A part of the time, sir, I was searching the location.

[fol. 157] Q. What else were you doing?

A. I believe I answered the phone on several occasions and I made several calls to Mr. Nelson on occasions.

Q. But you were going about the business of searching the premises yourself, isn't that right?

A. Myself and other officers, yes, sir.

Q. During the course of your search from 11:00 o'clock until 3:00, this is the information here that we have today that you took, these exhibits, is that right?

A. The exhibits that are here today?

Q. Yes.

A. Yes, that is correct.

Q. Regarding these exhibits, you say that you first found some exhibits in the den, is that right?

A. That is correct, sir, in the den portion.

Q. What did you find in the den?

A. The books were found in the den, that negative from which we have the 8-by-10 blowup now, that was found in the den area.

Q. Well, where else——

A. The negative itself and that 8-by-10—not this 8-by-10 but the negative and a picture were found in the closet upon the shelf. That is correct, sir. But the books and the pamphlets were found on the desk.

Q. Lying out on the desk, is that correct?

[fol. 158] A. I believe so, yes, sir.

Q. When you say you found photos and the negatives, they were in a closet in the den, is that right?

A. This particular one, yes, sir.

Q. And that was a closet in the den?

A. Yes, sir.

Q. Was there anything else in the closet?

A. Yes, there were several projection machines and various little rolls of film.

Q. Well, you searched every room in the house, is that right?

A. I believe so, yes, sir.

Q. Did you go down in the basement of the premises?

A. No, sir, I did not go down in the basement.

Q. You did not?

A. No, sir.

Q. Do you know if any officers did?

A. No, sir. I didn't.
Q. Did you go in the garage?
A. Yes, sir.
Q. Did you search the garage?
A. I did, sir.
Q. Did you find anything in the garage?
A. I did, sir.
Q. With regard to this evidence here?
A. Here today, no, sir. There is no evidence here today [fol. 159] that I found in the garage.
Q. Did you go through a locker or a chest?
A. I did, sir.
Q. Did you find anything in there pertaining to your search?
A. I did, sir.
Q. What did you find?
A. I found various photographs of various sizes, and I believe there are some ledgers, some purchase-order books, and that is all.
Q. Do you remember the dates on those ledgers?
A. No, sir, I can't remember the dates on those ledgers.
Q. Did they appear to be recent dates, do you remember that?

Mr. Nelson: Your Honor, I believe the question is ambiguous in that form. What is "recent"?
The Court: Yes.

By Mr. Maddox:

Q. Were you able to determine how recently any of the material had been placed in that chest, as far as a date was concerned, from any material that you found in the chest?
A. I can't recall the dates on the ledgers, no, sir.
Q. Did you find a newspaper?
A. Yes, sir, I did find a newspaper.
Q. Do you remember the date of the newspaper?
[fol. 160] A. No, sir, I do not.
Q. Did you find any clothing in this chest?
A. Now, that I can't recall, sir.

Mr. Maddox: I have no further questions.
The Court: Any redirect?

Mr. Nelson: Nothing further.
The Court: That is all.
Mr. Nelson: Robert Wood, please.

Robert A. Wood, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

The Clerk: State your name, please.
The Witness: Robert A. Wood.

Direct examination.

By Mr. Nelson:

Q. What is your occupation, Mr. Wood?
A. I am a policeman for the City of Los Angeles.
Q. Attached to what division, sir?
A. Attached to the Hollywoood Division, uniform.
Q. Mr. Wood, are you acquainted with the defendant David S. Alberts?
A. I am, sir.
Q. Directing your attention to the 26th day of June 1950, were you in Division 19 of the Los Angeles Municipal Court [fol. 161] on that day?
A. Yes, sir.
Q. Was the defendant David S. Alberts in court on that day?
A. Yes, sir.
Q. Do you knew whether or not he was in court pursuant to an arrest that had been made by you?
A. Yes, sir.
Q. Was he?
A. He was.
Q. What was the nature of the court proceedings on that occasion?

Mr. Maddox: I will object to it on the grounds it is incompetent, irrelevant, and immaterial and it doesn't tend to prove or disprove any issue before the court at the present time.
Mr. Nelson: May I be heard on the issue, your Honor?
The Court: Yes.

Mr. Nelson: The defendant in this case is charged with a violation of Section 647.5 of the Penal Code, which is a state of being a lewd and dissolute person. The evidence, I am convinced, if allowed in this case, will tend to show that on the above occasion he was convicted of being a lewd and dissolute person, and further the evidence will show, and I believe has shown, that he has not corrected his state since that date or made any amends in his manner [fol. 162] of associating with society.

The Court: The defendant is before the court at this time——

Mr. Nelson: It should also be stated, in fairness to Mrs. Alberts, that this evidence should only be directed against Mr. Alberts and not Mrs. Alberts.

The Court: There is included in this complaint now before the court a count charging a violation of Section 647.5 of the Penal Code.

Do you wish to say anything, Mr. Maddox?

Mr. Maddox: So that I wouldn't prejudice any rights of the defendants, I made my objection timely. I don't believe I am premature.

The Court: I am not urging you to argue it. If you would rather not argue further, that's all right, but if you wish to argue in support of your objection you may do so.

Mr. Maddoox: Well, my purpose in making the objection was to protect their rights. However, it has not been stated in the record yet what the charge was five years ago. I assume that counsel will attempt to prove to the court that five years ago the defendant Alberts was convicted of a crime of violating Section 311 of the Penal Code. Now, it is my opinion that Section 311 of the Penal Code does not relate to Section 647.5, and that any conviction five years ago is so remote that it cannot reflect upon character at this time, and therefore it is incompetent, irrelevant, [fol. 163] and immaterial.

The Court: Well, I go along with you to a certain extent, Mr. Maddox: I go along with you to this extent: I don't yet know what the charge was upon which Mr. Alberts was in court, the Los Angeles Municipal Court, in June, 1950, pursuant to an arrest made by this witness, Mr. Wood. I haven't given any evidentiary weight to it. But I gather from what Mr. Nelson said that it was under Section 647.5.

Mr. Nelson: No, your Honor. I did not intend to mislead the court, and perhaps it would aid you in ruling on this matter——

The Court: My first reaction was that if that was a conviction on 647.5 as to the defendant, it does not necessarily mean that it should be given any particular weight in so far as establishing a violation of any subdivision of 311 of the Penal Code in 1955 is concerned. However, there is a fourth count here against the defendants charging a violation of Section 647.5, and I think in respect to the fourth count the matter of any prior record along that line would be admissible.

Mr. Nelson: That is the People's position, your Honor.

The Court: The objection is overruled at this time. Your motion to strike can be reserved after we find out what this matter is that was in court in 1950.

Mr. Maddox: Very well, your Honor.

Mr. Nelson: I have forgotton the phraseology I used in [fol. 164] the question. Perhaps the reporter will read it back.

(Whereupon the last question was read by the reporter as follows:

("Q. What was the nature of the court proceedings on that occasion?")

A. Mr. Alberts was in court that day and he plead guilty to a violation of Section 311, subdivision 2.

By Mr. Nelson:

Q. Of the Penal Code of the State of California?

A. Of the Penal Code of the State of California.

Q. Do you recall whether or not sentence was passed on that day?

A. Sentence was passed, yes.

Mr. Nelson: No further questions.

The Court: Cross-examine.

MOTION TO STRIKE TESTIMONY AND DENIAL THEREOF

Mr. Maddox: No cross examination, your Honor, except that I wish to make a motion at this time to strike that testimony as it relates, of course, to any inference that

the defendants may be guilty under 311 of the Penal Code in this proceeding, and definitely also that it is too remote in point of time to show that the defendant Alberts at this time is a chronic, as we might say, vagrant under the section charged, 647.5, because in June of 1950 he plead guilty to a violation of subdivision 2 of Section 311 of the Penal Code. I fail to see in the law, Section 311 of the Penal Code, that that indicates any immoral or loose [fol. 165] or wanton nature of character that could be carried over for a period of five years from that date, or to the date of February 25th of this year.

Mr. Nelson: I think probably counsel's objection will go to the weight to be given the evidence but not to the admissibility.

The Court: The motion to strike is denied.

No cross examination?

Mr. Maddox: No cross examination.

Mr. Nelson: Nothing further.

May Mr. Wood be excused?

The Court: Yes. You are excused.

Mr. Nelson: May the exhibits heretofore marked for identification, your Honor, be received in evidence?

Mr. Maddox: If the court please, I would like to be heard on some of these exhibits before they are received in evidence.

The Court: Mr. Nelson, will you kindly pass these over so the clerk can mark them?

Mr. Nelson: Yes, your Honor.

These are not marked.

Mr. Maddox: As to the exhibits that have been marked for identification, I have no objection to their being received in evidence with the exception of Exhibit 12, which is a letter, and it was testified by Mrs. Regas——

The Court: Just a moment. I think the exhibit you [fol. 166] refer to is 17.

Mr. Maddox: Pardon me, your Honor. It is Exhibit 17.

Exhibit 17 is a letter, and it is the position of the defendants that that letter is purely hearsay, and further that there is no foundation for the introduction into evidence of that letter because it is not determined who wrote the letter, nor is the handwriting established or the ordinary course of mailing. Mrs. Regas may testify as to the

ordinary course of business and business dealings, but when she goes so far as to attempt to lay a foundation for this letter so it may be introduced in evidence, it is the position of the defendants that it is not a proper foundation and it is irrelevant and immaterial and attempts to inject hearsay matter into the record.

The Court: Mr. Nelson?

Mr. Nelson: If your Honor please, I believe the exhibit is certainly intended by the People to be introduced in evidence for the limited purpose of showing that both of the defendants, and particularly Mrs. Alberts, were in direction and control of this employee, Mrs. Regas, and instructed her to do certain things at that location; which, in fact, were carried out, and this being an example of the carrying out of one of the ordinary business transactions there. I don't know what is in the letter itself. I don't think, in my mind, the court need concern itself with the body of the letter but merely its presence there. [fol. 167] The Court: In testifying, Mrs. Regas testified as to her duties, and among other duties was that of removing cards from the file, and she stated that she did as a part of her duties receive letters which were the basis of the removal of the cards from the file or the withdrawal of cards from the file, and that Exhibit 17 was received by her in connection with her duties, her work or her employment; that it did have attached to it the address label as shown, and written on the letter the word "Remove." She stated that her directions as to procedure regarding the removal of cards and so forth had been given to her by Mrs. Alberts.

The objection to the introduction of this into evidence is overruled and it will be received but for the limited purpose of showing the procedure and not from the standpoint of what the letter contains, because it would be hearsay. But it is received for that limited purpose.

And at this time, so the record may be clear, may I say that the testimony of Officer Wood has been received only as to Mr. Alberts.

Mr. Nelson: Yes, your Honor.

The Court: All exhibits will be received in evidence.

Mr. Nelson: The People rest, your Honor.

The Court: It is a quarter to twelve. Do you wish to continue?

Mr. Maddox: May I examine that Exhibit 17, your Honor?

[fol. 168] (Document passed to counsel.)

MOTION TO ACQUIT

Mr. Maddox: If your Honor please, the defendants wish to make a motion to acquit and find the defendants not guilty, and that will take some argument: I assume there will also be considerable argument from counsel on our motion. Therefore I would suggest, if your Honor sees fit, that we recess at this time and return here and proceed with that argument, because it is ten minutes to twelve, and I wouldn't like to get into it, because there are certain connecting phases of the argument and I would like to do it at one hearing. I would ask that the court allow us to recess at this time and continue at 2:00 o'clock.

The Court: Court will recess until 2:00 o'clock.

Do you wish any further witnesses ordered back, either the People or the defendants?

Mr. Nelson: The People have no reason for any more witnesses, your Honor.

The Court: Do you wish any witnesses ordered back, Mr. Maddox?

Mr. Maddox: No, your Honor.

(Whereupon, at 11:46 a. m., a recess was taken until 2:00 o'clock p. m. of the same day.)

[fol. 169] BEVERLY HILLS, CALIFORNIA, Thursday, June 9, 1955, 2:00 P. M.

The Court: The People have rested, so you may proceed, Mr. Maddox.

Mr. Maddox: If your Honor please, I have filed a defendants' trial brief setting forth my memorandum of points and authorities, and I have given a copy to the District Attorney.

At the outset I am reminded, if your Honor please, of what Judge Hall said recently in a case wherein obscene matter was the subject of litigation. He stated to both counsel very emphatically, "Gentlemen, do I have to read this trash?"

My purpose in filing this brief, your Honor, is so that, if the court sustains my argument, it will prevent the record from being encumbered with what I state here to be trash.

If your Honor please, I don't want to go back into a review of law and facts that I know the court is familiar with, but briefly, as I have set forth in my memorandum, we must not lose sight of the fact before us that the defendants are charged under Section 311 of the Penal Code with willfully and unlawfully and lewdly having obscene matter for sale or in their possession for sale and advertising such.

At the outset I want to point out, your Honor, that the [fol. 170] People have failed to introduce any evidence whatsoever with respect to Count 3 wherein the defendants are charged with preparing and selling and distributing and exhibiting recordings or transcriptions used and intended to be used in producing and reproducing a lewd and obscene song. As to that count there has been no evidence whatsoever presented in any form.

As to the remaining counts here, wherein the defendants are charged with this obscene matter, I wish to review briefly the law on the subject. Back in 1868 the High Court of England set forth the test of obscenity as follows: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt the average normal person." I accentuate the words "average normal person."

In recent decisions Judge Hand in several celebrated cases has set forth that the word "obscene" shall be allowed to indicate the present critical point in the compromise between candor and shame to the average conscience, and not to fetter meaning by connotations to the lowest and least capable.

Continuing on with the memorandum I have filed, there are a number of decisions that set forth that "obscenity" in past history has not been constant nor has it been as to any particular period connoting one meaning or another in any period. And I make this statement because I am not

trying to state here that the word "obscene" is so vague [fol. 171] as to lack any legal or necessarily moral meeting. I do point out, however, that because of the necessity of proof when words such as "obscene" are used that there must be a clear and definite understanding as to what the law intended by the word "obscene."

And I bring it down to the present time to a case that most certainly I consider to be the law on the subject at hand. It is People vs. Wepplo, decided in 78 Cal. App. 2d Supplement at page 959. The case is set forth in my memorandum. And breaking it down so that we don't have to waste any time, the court in this Wepplo case states that a book or subject matter is obscene if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.

Nowhere in history until recent date has the word "substantial" been written into our law. And it has been written into our law because of the so-called confusion that has existed in applying the law of obscenity. And in this Wepplo case they have therefore decided that the law being that if any reading matter or so-called lewd subject matter or lascivious pictures, photos, or whatever they may be, incite lustful desires or lascivious thoughts, the mere fact that it is a mere inciting of such is not enough; there must be substantial apparent incitings of such thoughts and desires.

If your Honor please, in examining the evidence before [fol. 172] the court here we have certain exhibits that are set forth, I believe in all, a total number of about not more than 28. I might not be correct in my number, but I have 28 exhibits. I believe that possibly there are several items that are letters and stickers and gummed labels and such as that, but the exhibits that are presented here might be, as I say, some 24 or 25 exhibits. Here they are before us.

Now, if your Honor please, if you have to read through these exhibits and decide yourself whether this matter is obscene, it will not be practical. And I don't think counsel, myself included, are being fair to you when we ask you to do so, because if we examine the law on the subject, this particular bit of evidence we have here, whether trash or not, does not meet the test of obscenity legally because

there is a further requirement in the law of obscenity that the reading matter or the photographs or whatever it may be, in addition to having a substantial tendency to incite the reader or the viewer to lustful thoughts, it must apply to the average normal person. If it doesn't apply to the average normal person, then we have no practical application of the law whatsoever. And I do not mean to trifle with the court here, but I am reminded of a story that possibly has been told many times of a visitor who came to a city, and upon being shown about by the guide he was told that this particular statute represented some historical fact or event; he was told about the buildings. And to every [fol. 173] direction to a historical site or to a library or to a park, this visitor said, "It reminds me of sex."

And after a while in exasperation the tourist guide stated, "Why is it that everything I point out reminds you of sex?"

And he said, "Well, everything does."

Now, that person is not normal. If your Honor please, we cannot take that so-called person who has the idea that anything or everything may remind him of sex and make that person the average normal person.

If you take the views here of people who would read these so-called exhibits in evidence, I daresay that there are many who look at it or read it that will have many different opinions as to whether or not it stimulates their thoughts to lustful desires.

So we must again take this man who tramps from page to page through the law, Mr. Reasonable Man. And I say they have applied it again in the law of obscenity by saying that the average normal person must be affected by this.

Most certainly if we take, for example, this exhibit entitled "Tina's Torture"—I don't know if the court has looked at it or not——

The Court: I haven't looked at any of the exhibits.

Mr. Maddox: "Tina's Torture" is a series of cartoons that set forth a victim who apparently is caught by some group. We don't know whether they are outlaws or not, [fol. 174] that isn't apparent. But anyway there are representations of Tina being tied up and being subjected to cruelty. In these so-called cartoons Tina at no time is

naked, nor are any of the other persons in the cartoons naked; it is merely a representation in the cartoon that Tina is subject to abuse, to torture and torment.

Most certainly we could all say, having had some knowledge, that that particular bit of cartoon strip might appeal to a certain person. Now, it wouldn't appeal to me and it wouldn't appeal, I am sure, to anyone in this courtroom, because I don't think anyone here has the tendencies that might be indicated as sadistic, nor does it appear that it could appeal to a person who is a masochist. nor does it appear that it might be such that it might appeal to a person who likes black such as Tina wears in these particular cartoons.

I am making this statement to the court because if we go to each one of these exhibits and say that this particular exhibit may appeal to a person who is a sadist, then we are ruling out Mr. Average Person who must read it. And as I state in my memorandum of authorities in these decisions they say that we cannot in the law of obscenity cater to those who are depraved or who are abnormal, because there is no practical application of the law.

If your Honor please, I am not going to go through all of these exhibits, but I want to state now that we have as [fol. 175] Exhibit 1 a group of books, and those books are small, and they have very lurid and inflammatory titles. And reference may be made to those books by looking at People's Exhibit 3, wherein these books' titles are set forth, and, without a doubt, if a person would read those titles, why, they would immediately believe that they were going to read something that was lustful and would involve secret and perverted practices.

I point out that the law has never been that a title in itself, that is, the wording itself, was sufficient to be obscene unless it involved abusive language, of course, such as profanity. And nowhere are any of the particular titles here designated to be of a nature that involves profanity. Most certainly they would arouse the curiosity of a person who reads them.

The law has been and it is set forth in this Wepplo case, and it cites certain other decisions such as Commonwealth vs. Eisenstadt, which is a Massachusetts case, that a book

or a part of a book must not be taken just in itself. Now, the whole book need not be read, but just the title of it or a page is not sufficient to call an entire volume obscene. So the fact that these books here are introduced in evidence doesn't in any particular establish that they are obscene except by a so-called innuendo or an implication because of their titles.

[fol. 176] Now, if your Honor has to read all that, it is certainly going to be a task that I wouldn't have this court or any court undertake. Therefore I suggest that in examining these exhibits here we look at the exhibits and apply the test as to whether or not they, in themselves, that is, the photographs, the cartoons, would, to the average person, stimulate lustful thoughts and desires. I fail to see where they would do that.

Our position is this: that under the Penal Code, before the defendants can be convicted it must be established that these exhibits are obscene under the law, and my memorandum sets forth the rules.

Now, what do some of the cases say as to the establishment or the burden of proof as to obscenity? They say this: that where there is an uncertainty there must be some social or there must be some psychological or medical testimony to establish the fact of obscenity, because the court is not an expert. The court cannot take judicial notice that certain exhibits here may or may not appeal to a sadist or one who practices onanism or any other perverted or sexual practice. That hasn't been introduced here. There has been no testimony here to establish that any of these exhibits would arouse any particular individual at all.

What has happened is this: The vice officers have gone out and, pursuant to a search warrant, have taken certain objects and exhibits and brought them before this court. And might I add that I believe Sergeant Bridges said they [fol. 177] took several thousand. And out of several thousand we now have before this court possibly 28 to 25 exhibits. They are intending to have this court believe that these exhibits out of all that many thousands indicate that the defendants here willfully and lewdly are conducting a business of operating this type of a mart for the sale of obscene literature.

If your Honor please, the case falls. There is no testimony here from any expert or from any source whatever that this particular material is obscene in itself. The ordinary matters that any normal average person could decide to be obscene are not presented here. There are no photographs of women or men in the nude showing pubic hair; there are no erotic poses; there are no combined poses of men or women; there is nothing here in the way of photographs, there is nothing here at all that to the average normal person would excite that person to lascivious thoughts.

I have examined this evidence, and counsel has examined this evidence, and if the court desires to examine this evidence that must be done. But I am trying to prevent the court from going into this whole detail here, because, if your Honor can understand the law further—and I know that you can—if it is decided that your Honor believes that this particular bit of evidence is obscene, the People still [fol. 178] have to go further. They must establish that the defendants willfully and lewdly held themselves out and sold this particular merchandise. That is the Wepplo case in effect: that, even though the subject matter may be obscene, the defendants must willfully and lewdly sell and offer to sell this particular merchandise.

I submit, your Honor, in honesty and in candor, that if the People desire to prosecute this type of offense there are means of obtaining evidence. They can answer the ads. They would like the court to believe that this defendant and his wife are conducting a business here that is a menace to the community, that they are proselytizing youth. They have introduced a letter here, which I know has only been received for a limited purpose, namely, to show the operation of the business. Yet, if your Honor please, they could secure this information by answering ads; they could send someone to buy this merchandise and bring it into court and testify that on such and such a day that person received through the mail such and such an advertisement or brochure. He could testify, "I filled out, in compliance with what was stated on this brochure, information of what I wanted, and I then received in the mail ten days or two weeks later the following merchandise." They could come into court and they could tie up the brochure with the exhibit. And

that has not been done here. There hasn't been anything [fol. 179] done here constructively except to show that the defendants possibly were in possession of a warehouse, that they operated a place of business on Melrose Avenue. And to go further, if your Honor please, the detectives, the Vice Squad, went out to Los Angeles, out of the jurisdiction of this court, and went into these defendants' home. They went through their personal effects. They stayed there from eleven o'clock until three in the afternoon, and they came out with several exhibits, and one of which they have tried to tell the court the defendant Alberts may have destroyed. And if he did destroy it, so what? It wasn't obscene. This one particular exhibit that the defendant Albert is alleged to have destroyed is a photograph. Now, in Parmelee versus the United States, which is set forth in my brief, and in a local proceeding here in this court, Judge Byrne decided that the Marilyn Monroe photographs were not obscene, and a nude in itself was not obscene. So that the defendant is alleged to have destroyed a nude, although they haven't proved nor have they established that that particular potograph was in the warehouse on Melrose Avenue. They haven't tied up any of this.

I submit under the law that the defendants should not be required to present evidence on this, because the People have failed to substantially establish the corpus delicti: first, that this material is obscene, because they have failed to produce an expert that will so testify, and that the court [fol. 180] has no right to take judicial notice of the conclusions of police officers; also that under these cases I have set forth here, and the United States Supreme Court through federal decisions have ruled, that there is a certain norm in a community, a certain standard, and in one community what may be obscene may not be in another; depending again on this average individual.

I would like to point out, your Honor, that these defendants are operating a business, if that evidence so establishes the case, here in the Sunset area, on Santa Monica Boulevard, and on Melrose Avenue; that somewhere on Sunset Boulevard they have a Sailor Jock Club within a few hundred yards. And within a radius of a mile or so we have such establishments as Ciro's, where Lili St. Cyr did a

strip-tease and was arrested and subsequently found not guilty, and we have such establishments as the Club Gaiety and Ray Burbon's Club that have catered to homosexual entertainment. We have, within a radius of half a mile of the defendants' place of business, business establishments that employ men who no doubt have calendars in their offices and in their garages and in their manufacturing plants showing Marilyn Monroe in various poses and states of nudity.

Now, if your Honor please, if you are going to follow the law of obscenity, you have to take these rules into consideration. The court can't be influenced by the fact that this is bad taste, that it shocks your modesty, that we are [fol. 181] against it, that the titles most certainly are such that they excite a lascivious idea. The law must go further. I submit, your Honor, that I am interested in good law, and it is quite apparent that these defendants and others do not operate where there are municipal ordinances, because under the municipal ordinances the law states that possession in itself is sufficient; while in a case such as this under the Penal Code there must be this additional proof that what was done was done willfully and done lewdly. And as I have set forth in my memorandum, "lewd," "wanton," and "dissolute," those terms are interchangeable. There has to be some fact here to show that the defendant displayed—that they openly were brazen, that they made no particular restriction about the way in which they advertised.

In this Wepplo case and in other Municipal Court cases where the defendants have been charged under a municipal ordinance, they have maintained bookstores and bookstands, and there the material has been displayed openly to the public on newsstands. And the court there has very reasonably concluded that this is lewd, this is offensive to women who walk by, and offensive to people of fine natures. But here these defendants have a closed door that only can be entered with a search warrant. They mail this matter out and they are in the County of Los Angeles. And I submit that if the People are attempting to drive these facts in and force the facts into the law that do not apply, this [fol. 182] case should resolve itself whereby the court

grants the motion to have the matter dismissed against these defendants. And the very proof, the very fact that the People are attempting to force this fact of obscenity into the law under the Penal Code is evidenced by the fact that they bring in here a fifth count of vagrancy, subsection 5 of Section 647 of the Penal Code, alleging that these defendants are lewd, are dissolute people, that they indulge in lascivious habits in their life, and conduct themselves accordingly.

And how do they do this? By bringing in a conviction that is nearly five years old against the one defendant, David Alberts, that he plead guilty to a violation of subsection 2 of Section 311 of the Penal Code.

The court should not be burdened with this type of case.

Now, I say something else here that is quite evident. None of the exhibits are tied up. You take these brochures, People's Exhibit 3 here, where it sets forth in flamboyant language and with photographs and with every type of description of the English language, with connotations to the mind, that if a person subscribes to this they are really going to receive something. Well, there isn't any evidence here that any of these items are tied up at all. I think the only evidence we have is by one police officer that he saw a hula dancer that appeared to be somewhat like the one that was in one of these brochures.

[fol. 183] I have known this court to be alert to the evidence, and I don't think I need take undue time in pressing these matters. I have set forth in my memorandum that if the brochure is advertising a nude, Marilyn Monroe, playing cards or in a stag party, that in itself is not obscene. I further state this, that in a previous case before this very court, where a defendant was formerly charged with violation of Section 311, subdivision 2, of the Penal Code, the People attempted to bring in exactly the same evidence. I don't think there is a bit of difference with any of these particular exhibits than there was several years ago. At that time they brought in some alleged photographs that showed women, well, in a tussle—I'll put it that way—and we might very conceivably say that some person might imagine that those particular photographs were appealing to a sadist. We have the same thing here. We have a group

of photographs of women that are apparently in a tussle, rolling about, but again we haven't the evidence or the proof that such fact is that that evidence would appeal to a sadist.

Now, we go a long way in the law when we say that this evidence here is sufficient to convict and to justify the court in granting the People the right to say that they have made the burden of proof. I don't believe they have.

I leave it this way now, your Honor: Under the memorandum that I filed there are authorities. I can't expect [fol. 184] the court to read them all right now. I don't want to be repetitious, but they set forth these rules, and these rules are well established. And most certainly; if the People are going to proceed under the Penal Code, they have to make out a case and not try to bring in the case by implication.

Thank you.

Argument in Opposition to Motion to Acquit

Mr. Nelson: May it please the court, I deliberately refrained from making objection to what appears to me to be an argument of the facts involved in this case in advance of its proper time. However, I want to say that I share the concern for the court's time and the effort it would take to peruse this literature. However, I am of the definite feeling, as I am sure the court must be, that we cannot escape the fact that the court is going to be the trier of the facts in this case, and that the facts have been presented, and regardless of our personal feelings in the matter or our regard for the court and its time, I think that the duty is squarely before us now to decide the case on its merits and not upon an untimely motion by counsel; nor do I think the case should be decided on what the People have not done, if, in fact, there is evidence that we have carried the burden of proof.

Counsel has made reference to the average individual as being the person who has to be offended or incited by this literature. I do not think he can seriously feel that we have failed by failing to produce an average person; for he [fol. 185] knows and I know and I am sure the court knows that you cannot go out on the street and find an average

person. "Average" runs a wide gamut. "Average" can connote anything from bordering on the superior to bordering on the deviate. And who is to tell whether the average person bordering on the deviate, who reads this thing for these things, would slide over into a serious deviation from the norm? And that is the problem we have to worry about.

Counsel has cited in his brief, I notice, a portion of the opinion of Judge Woolsey in the case of the book "Ulysses." It is regrettable that he only cited a portion of the opinion. If your Honor has the opportunity, the volume that has been published for most of the period of time of the publication of this book since the opinion carries in the preface to the book the entire opinion of Judge Woolsey, and I don't think that an excerpt would serve to carry the meaning as it was intended by the judge. It is mentioned in this excerpt from the preface to the book that obscenity deals with something that exploits sex. It doesn't mean that where something casually mentions sex in the course of a discourse upon some artistic subject is obscene, and with that I agree and I am sure counsel agrees. But where in this batch of evidence before us, your Honor, do we find the book "Ulysses"? Nor do I see anything that approaches it. I see titles, pictures, cartoon strips, all of which are directed toward the exploitation of sex.

[fol. 186] Now, counsel has made a point that we have failed to show that these items were being held for sale by these defendants, or for distribution. The sale brochures are in evidence, if your Honor please. On the third open leaflet of People's Exhibit 2, there it says, in what covers practically a third of the page: "It is great. It is new. It is sensational. Tina's Torture. The best bondage serial ever made." And it states the price.

Likewise counsel himself in his motion, if we can call it that, made reference to the books which are on the table here, which are mentioned in this yellow brochure which is People's Exhibit 3 for identification. I fail to see how, when he argues himself that the books that are in evidence are there listed in the brochure, he can say that we have failed in that respect.

In conclusion I think that counsel is erroneous in assuming that the court should not read this evidence, but instead should read his trial brief. I think the only way a conclu-

sion can be reached in this case is for the court as the trier of fact to consider the evidence as presented.

The People most strenuously oppose the motion of counsel.

The Court: Anything further?

Mr. Maddox: No, your Honor.

Colloquy Between Court and Counsel

The Court: Gentlemen, at this time the only matter or [fol. 187] thing before the court to decide is to rule upon the motion of the defendant for a dismissal. Is that correct?

Mr. Maddox: Or for an advised verdict.

The Court: In order to do that, in the opinion of the court, it is necessary for the court to determine from the case as presented by the People whether or not they have presented a case, and I frankly don't see how I can do that merely from reading the brief and hearing an argument or from hearing the oral testimony that has been offered. I feel that it is necessary that the court review these exhibits that have been offered, and I won't go much into the matter of argument.

There has been some reference made to the fact of there being a further requirement that in addition to the matter of obscenity it is necessary that it be shown that it applies, so far as being obscene, to a normal person and not to a depraved person. As to whether or not it incites desires of a sexual nature, sexual desires, I don't care to comment on it at this time.

I will say that as far as the People's case is concerned in satisfying this court that the defendants were engaged in selling or offering for sale or having their possession for sale the exhibits, generally speaking—there are some exceptions, possibly—I am satisfied that they have made their case.

A reference has been made in your argument, Mr. Mad- [fol. 188] dox, to the fact that the officers admitted that they took several thousand exhibits. If I recall the officers' testimony in relation to the matter of exhibits, I think one of the officers said there were some six exhibits besides those that he was offering but they had taken them in quantity.

Frankly I can't see the difference between the People offering in evidence one each, as they have, of, we will say, 10 or 15, or whatever it may be, different items, and offering in evidence 1,000 items, if any or all of those exhibits are obscene and if they are being offered by the defendants for sale and are in their possession for the purpose of sale. I don't think the number is too important.

Mr. Maddox: Well, we made reference to that on the question of lewdness and willfulness.

The Court: Of course, on the matter of lewdness and willfulness, I don't know whether it gets into the Ulysses case or not, but that involved a book, or at least the case I have in mind involved a book in which a bookstore operator or dealer was on trial. I forget the case. It may be the Wepplo case. But in this particular case they held that the defendant was not guilty because of certain wording in the book, and he wasn't required to know what the contents of the book may be.

Mr. Maddox: That's the Fananstein case.

The Court: Fananstein. But that of course is getting to [fol. 189] the matter of the contents of the book. Here we have quite a few books, and here we have quite a few pictures. And, as I say, I haven't looked at any of them yet. I feel that the only way the court can intelligently rule on your motion would be to recess at this time and to take all of these exhibits, and rule on it, if you wish, tomorrow morning at 9:30.

Mr. Maddox: That's satisfactory, your Honor.

The Court: Is that satisfactory with you, Mr. Nelson?

Mr. Nelson: May I ask, off the record, if the defense is going to present evidence upon this in the event of an unfavorable ruling on the present motion?

Mr. Maddox: There will be evidence presented on behalf of the defendants.

Mr. Nelson: In other words, we will be here tomorrow?

Mr. Maddox: Yes.

Mr. Nelson: Yes, that's satisfactory with us, your Honor.

Mr. Maddox: Now, I don't know if this should go on the record or not, and if it does it is all right with me, but I believe, counsel, honestly and sincerely, that the court

should not be required to read some of these exhibits, because you have read them and I have read them, and I think we can agree that some of them, without question, the court shouldn't be burdened with. Now, do you feel that way about it?

[fol. 190] Mr. Nelson: I feel this way, counsel, that should any of these strike the court as you have represented, that they are not worth giving too much attention to, that fact will become immediately appreciable to the court and he will know, and I think the only way this can satisfactorily be approached is to have the evidence looked at as it sits.

Mr. Maddox: I am speaking now of Haldemann-Julius books.

Mr. Nelson: Those little tiny books. And it is dry reading. And I am sure, if you have read them, you would know that it is a fraud on the public to induce them to buy them.

Mr. Maddox: If your Honor, as the trier of the facts, has to read all of that—I am trying to avoid that for the court.

The Court: Whatever your wishes are. I will read them all if you figure they are all properly in evidence as to the issues before the court.

Mr. Maddox: I don't think the court can——

The Court: I don't think the court can read all of them between now and 9:30 tomorrow morning.

Mr. Nelson: I don't think, counsel, it will be necessary for the court to read them all, as you indicate, from cover to cover. There are certain impressions that are gainable from these things at first impression.

Mr. Maddox: All right.

[fol. 191] Mr. Nelson: And I think we are exercising ourselves unduly over something that might not happen. I hope sincerely that it won't.

Mr. Maddox: I can say that I have heard that the judge is a good and avid reader.

The Court: The court will recess until tomorrow morning at 9:30.

(Whereupon, at 3:15 p.m., a recess was taken until the following day, Friday, June 10, 1955, at 9:30 a.m.)

[fol. 192] Beverly Hills, California, Friday, June 10, 1955.
9:30 A. M.

The Court: People versus David S. Alberts and Violet E. Alberts.

Mr. Maddox: The defendants are present and ready.

Mr. Nelson: The People are ready.

The Court: The court is now ready to rule on the motion made by Mr. Maddox yesterday before we recessed, unless either counsel wishes to present further argument.

Mr. Maddox: No further argument.

Mr. Nelson: No further argument for the People, your Honor.

RULING ON MOTION

The Court: At this time the People have rested their case.

In considering the motion made by the defendants, if at this time there was no defense presented, the court would find that as to Count 3, charging a violation of subdivision 5 of Section 311 of the Penal Code, in which the defendants are charged with keeping and maintaining records, recordings and transcriptions intended to be used in producing and reproducing a lewd, obscene song and words, the court finds that there has been no testimony offered in support of that third count.

As to Count 4, charging a violation of Section 647.5 of the Penal Code, charging the defendants with being willfully [fol. 193] and unlawfully lewd and dissolute persons, the case as presented, in the opinion of the court, is one in which the defendants' guilt or innocence of any criminal acts, in so far as the testimony as given is concerned, relates more to Counts 1 and 2, and I am not satisfied that the testimony is such as would warrant a conviction on Count 4.

The court therefore dismisses Counts 3 and 4.

As to Counts 1 and 2 the court finds that the defendants David Alberts and Violet E. Alberts were, on or about the 25th day of February 1955, maintaining a business at two locations in the County of Los Angeles, one on Melrose Avenue, and the other on Santa Monica Boulevard, one a store building and the other in the nature of a warehouse,

and at that time they were selling or distributing or were keeping for sale certain writings, papers, and books, and they were also at that time writing, composing, and publishing advertisements relative to their stock in trade; that as a part of their sales procedure they were distributing brochures which are in evidence as People's Exhibits 2 and 3, and that they were distributing these by mail from their location at 8627 Melrose Avenue.

Now we get down to the real meat of this case, and that is whether or not these writings or papers or books that were being sold and offered for sale or distributed or kept for sale were obscene and indecent, which is the first point [fol. 194] covered by the defendants in this trial brief, which, of course, while we are not yet ready for final judgment, nevertheless relates at this time to whether or not the People have made out their case.

I read this through, and I spent considerable time—all afternoon and quite a lot of time here last night—going through not only the brief but the cases cited, and also reading and reviewing the People's exhibits.

I think first I will just go through your brief, Mr. Maddox, and tell you how it impresses me as to your arguments in the matter.

First, as to the definition you refer to, you say Webster's dictionary defines "obscene" as "offending modesty or decency; impure; filthy and vile."

The Merriam-Webster New International Dictionary defines it as follows:

> "1. Offensive to taste; foul; loathsome, disgusting.
> "2. Offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be exposed; lewd; indecent; . . ."

Under the section of the Penal Code involved, namely, Section 311, subdivisions 3 and 4, a necessary part of the People's proof is to show that such writings and so forth are obscene.

[fol. 195] There is also used in this section of the Code the word "indecent."

"Indecent" in Webster's is defined as "Unbecoming or unseemly; morally unfit to be seen or heard; offensive to modesty and delicacy."

Webster's definition of "obscene" includes "lewd," and "lewd" is defined as "Lustful; libidinous; lascivious; unchaste," a synonym for "lewd" being "sensual."

Now, next on page 2 of your brief you refer to the Hicklin Rule in 1868 in England, in which you state that "Whether the tendency of the matter charged as obscenity is to deprave and corrupt the average normal person." You also have on the same page a reference to the decision of Judge Woolsey in the case of United States vs. Ulysses, where he, according to your quote here, states that the meaning of "obscene" is "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts of a person with average sex instincts. It is only with the normal person that the law is concerned."

And I believe in your brief you indicate that there is a question as to whether the court can determine what is a normal person.

Later on in your brief you present certain other situations which you indicate to be analogous. That's on page 8 where you refer to the fact that the court cannot judicially know of gambling or games of chance, and the court cannot [fol. 196] take as a matter of judicial notice the relative effect of narcotics or the percentage of alcohol necessary to be intoxicated, which is, of course, true.

I feel that, as to a normal person, that is, what is a normal person, as long as one of the references you make is to the matter of intoxication, the rule in relation to the driving of an automobile by a person while under the influence of intoxicating liquor in violation of Section 502 of the Vehicle Code—and there are others too which refer to a reasonable person—that it does not require a psychiatrist to determine what is a normal person.

On page 3 of your brief you cite the Parmelee case, in which you quote them as saying: "The question is a difficult one as to which the expert opinions of psychiatrists and sociologists would seem to be helpful if not necessary."

Now, I didn't have that case, but I notice you refer to it on page 4 of your brief, in which you state that "the court pointed out that the individual views of one person are

not sufficient, saying at page 732: 'The question is one to which expert opinions are necessary.'" However, as to the necessity for expert opinions to determine that, you quote People vs. Wepplo, 78 Cal. App. 2d Supp. at 959, in support of your position, and it is quoted on page 6 of your brief, where you say in that case it was not sufficient in order to convict under the Penal Code to prove that obscene [fol. 197] material was sold, but it must also be proved that it was done willfully and lewdly.

But that same case also states as a part of the opinion the following: "Yet the book"—that is, the book which was in evidence—"is obscene if it has a substantial tendency to deprave or corrupt its reader by inciting lascivious thoughts or arousing lustful desires." And they cite several cases, including federal cases, in support of that position. And then the decision continues as follows:

> "The question whether any particular book is obscene or indecent is primarily one of fact to be decided by the jury."

Of course, we are sitting without a jury, and in this case the court is the trier of the facts and of the law in the matter.

It goes on to say here: "The book was introduced into evidence as an exhibit"—well, here, of course, we do have the exhibits, which I will get to in a minute—"and the jury read it. We cannot upset their determination that it was obscene or indecent unless we can say that upon consideration of the book they could not reasonably reach such a conclusion."

Now, that is from the Wepplo case and it is a part of the opinion. So I believe that the court is in a position to review the testimony and the exhibits offered and make a finding as to whether or not the pictures and the books, or [fol. 198] any of the offered testimony is obscene or indecent.

Now we will get to the exhibits. Exhibit 1 consists of a bundle of small booklets. The court will frankly admit that it only read a portion of one of the books in that exhibit, and I believe it was the black and yellow folder.

Mr. Nelson: Yes, Exhibit 3.

The Court: And while the booklets, you might call them, that compose Exhibit 1 are specifically listed in the advertising brochure, People's Exhibit 3 says: "Are ordinary novels too tame for you? Here is exciting intimate reading that gives you that thrill." And then it refers to pocket-size editions, wherein are listed all of the booklets in 3, together with some others.

I would say, from the little bit that I read in one of those books, that if the purpose of this advertising is to impress the persons who are the prospective customers that they are going to read something that is really obscene or indecent or create sexual passions, and so forth, I think they are going to be disappointed possibly as to that particular book. If it wasn't the kind of literature that it is, it would be more in line to go to the Better Business Bureau about false advertising. That Exhibit 1.

Now, Exhibit 4, consisting of a packet of what might be designated or described as photographic copies of cartoons, with three to a strip, and all of them seeming to relate to the title which appears on the first one, namely, [fol. 199] "Presenting Tina's Torture," is described in the advertising brochure which is People's Exhibit 2. I say it is described there, and I don't think there can be any question about the advertisement in that brochure referring to these particular strips; because not only is the advertisement itself entitled, "It's great—it's new—it's sensational—Tina's Torture, the best bondage serial ever made," but there appears in that ad a copy of the very first picture in the cartoon series of a girl bound with ropes and so forth. And it also has another reproduction of one of the other pictures in the series, which is further on in the series. So I believe the court can definitely assume or presume the ad is advertising this serial.

In addition to Exhibit 4 we have Exhibit 6, consisting of 20 packets of pictures.

We also have as People's Exhibit 13 an envelope containing quite a few photographic copies of cartoons, with three cartoons to a strip, entitled, "Madame Olga's Recruits," and also in the same envelope are the negatives of these cartoons.

People's Exhibit 15 consists of six negatives to a sheet, together with some of the prints from these negatives.

People's Exhibit 16 consists of six negatives taped together, together with prints from those negatives.

The reason I have listed all these exhibits together is because they are all along the same line of subject matter. [fol. 200] Referring back again to the ad brochure, People's Exhibit 2, in which is advertised "Tina's Torture," it says, "Best bondage serial ever made." And as the title of the picture indicates, "Tina's Torture," they are all torture pictures.

People's Exhibit 13, "Madame Olga's Recruits" are torture pictures.

The others that I have referred to are pictures of, in each case, two girls, one torturing the other. In all of these cases the girls wear brassieres, usually rather lacy, and short panties, and usually, if not always, black stockings. All of these attitudes depict one binding or torturing the other.

Now, as to those pictures and the offering of them for sale: The brochure, People's Exhibit 2, in which "Tina's Torture" is advertised, consists entirely of pictures or booklets or peepshows and so forth, which, according to the ad itself, is intended for the following purpose—and I quote from the ad: "Men, let's face it There is a lot of sock that can be gotten from adult items dealing with our favorite subject, Sex, but you have got to play by the rules, and that is, restrict these rules for the article. You can get at these hard-to-get stag items if you keep your pledge."

Now, as to offering the exhibits that I have referred to for sale or keeping them for sale: As I said, all of [fol. 201] these are of women who are being subjected to physical torture, which must be offered to the public from the standpoint of satisfying certain sex desires of the buying public.

We find that the definition of "perversion" in Webster's, under number 3, is: "A maladjustment of the sexual life, such that satisfaction is sought in aberrant ways, as in sadism, masochism, exhibitionism, etc."

And again getting to the definition of the word "aberrant" as used in the definition of "perversion," it is defined as "Deviating from the ordinary or natural type; exceptional; abnormal."

I feel that the offering for sale or sale of such things as that is offering something that is obscene to the normal person. It is very desirous to the abnormal person who gets sexual gratification out of torture.

As to People's Exhibit 5, consisting of eight booklets, paperbound, I have not read all of them through. I have gone through some of them to get an idea of what they are all about, and I find that most of them—well, three of them or four of them are by one author, and four others by another author, both of whom, according to the booklets, are M.D.'s. I will now refer to the booklets entitled:

Bestiality and the Law—A resume of the Law and Punishment for Bestiality with typical cases from the Fifteenth Century to the Present.

Bestiality in Ancient and Modern Times.

[fol. 202] The Picture of Conjugal Love.

The Business Side of the Oldest Business.

William Heirens—Notorious Sex Maniac.

Petting as an Erotic Exercise.

Male Homosexuals Tell Their Stories.

Female Homosexuals and Lesbians Tell Their Stories.

Questions and Answers about Oragenital Contacts.

Now, as to the booklet on "Petting as an Erotic Exercise," the word "erotic," according to Webster's dictionary, is: "Of, pertaining to, or treating of, sexual love; amatory.

"2. Strongly affected by sexual desire; as, an erotic person."

Now, all of these booklets are written by, we assume, two M.D.'s—no, only one of them is an M.D. I don't know whether the other, named Caldwell, is an M.D. The other author is Niemoeller.

As you read these books, the titles are so worded as to indicate that they are meant really for assistance of those who are interested along medical or scientific or psychological lines, to give a history or background of these subjects merely for the purpose of serious consideration by those persons who would have reason to consider them seriously. But is that the purpose for which they are being offered in the advertising brochure, People's Exhibit 3?

[fol. 203] We find that the first page of that advertising brochure reads as follows in large letters: "Banned by Bigots Who Cannot Stand the Meaning of the Word 'Sex.' But Available To You If You Hurry." Then there is below that a statement in the form of a letter on the subject of uncensored books, which ends, "Cordially, Male Merchandise Mart." And in that letter it says: "Note: We make every possible effort to prevent these books from reaching young people or persons who would use them for the fulfillment of indecent desires."

In other words, it is recognized here that certain persons would use these books for the fulfillment of indecent desires. It is also recognized here that evidently the books should not reach young people. I know of nothing that says that because a person is young he is not normal.

Now, a young person can be as normal and I believe can be recognized as being as normal with relation to matters of sex as an old person. And yet the pamphlet itself recognizes that fact, that everything in this pamphlet that is advertised, they are making every effort, every possible effort, to prevent these books from reaching young people or persons who would use them for the fulfillment of indecent desires.

Now, as we look through this pamphlet, let's consider whether or not this pamphlet is being circulated to prospective customers who would be interested in these books and [fol. 204] booklets from the standpoint of serious study of the subjects. But what do we find? As we look into this pamphlet further, it says: "Books on every angle of sex. Learn more about sex to get more out of life. For obvious reasons we cannot advertise these books through regular channels, so be sure to order by number." And it lists these books and others; that is, these books which constitute People's Exhibit 5, and others. But, so that there may be no question as to the type of trade to which this pamphlet appeals, it also has the following ad in it:

"Are ordinary novels too tame for you?"

Now, that gets back to those pocket-sized editions, People's Exhibit 1, which I have already referred to. Also there is advertised here: "Sex in Prison."

Then there is another one here showing one nude girl running and another one lying down. It says: "Wild French Cartoons. You'll giggle . . . you'll gasp . . . you'll pop an eyebrow . . . for these are the no-holds-barred Frenchy cartoons you've heard so much about."

I don't think they would be sending this to a mailing list of doctors or psychologists who were interested in the subject matter covered by these booklets from a serious standpoint.

Also they have reference to the "Flimsey Report—An illustrated report on sexual behavior in the female that's outselling the Kinsey Report itself."

[fol. 205] They also have reference to "French love stories, racy, risky—as only the French know how." So you can see to whom the defendants are appealing in this ad.

However, getting back to the booklets themselves, as to whether they in themselves are obscene, the court would hesitate in saying so because the books in themselves, I don't believe are obscene, though there is much in these books which in the hands of persons who are desirous of having their lustful passions aroused, they would get a lot of valuable material out of them.

Now we come to Exhibit 9, consisting of five bound books. The court has not read all these books, but in that connection I again refer back to the decision in the Wepplo case which says that you must consider the book as a whole in determining whether the law is violated. But this does not mean every page must be of the character described in the statute. You decide not by counting the pages but considering the impression likely to be created.

Now, I refer to one of these books, entitled "Witch on Wheels." This is about a young girl who, in the beginning of the book, I believe, is either 16 or 17 years of age. And it starts right off, and page after page—I don't believe there is a page here that doesn't bring out some reference to her breasts or her legs and the rubbing motion of her leg against her thigh—page after page after that. And, incidentally, it is interesting in this book on page 17 to read [fol. 206] from this book one paragraph. It seems as though she worked in a post office and had just delivered a

packet of books to an older man, and had gone to his home to do it. It says:

> "Surprised by her unexpected candor, Mr. Fuller sat shock-still, the cup balanced on his leg. Darlene tabled her empty cup, and avidly tore open the parcel. Then she ran a finger over each book as she read the titles:
>
> 'Sex Happiness.
> 'Homosexual Neurosis.
> 'Psychopathia Sexualis.
> 'Sexual Aberrations.
> 'Our Sex Life.
> 'Bi-sexual Love.
> 'Sex Satisfaction.
> 'Sex Technique.'"

I merely refer to that, and it is interesting because in this very book it refers to the man and the girl being interested in the very type of books or pamphlets that we have in evidence.

Within the first three or possibly four paragraphs of that book this 17-year-old girl has made advances to men—I say "advances"—she has so conducted herself as to lead them up the point of intercourse, although I don't think it was until the fourth chapter that she actually had intercourse [fol. 207] with one of the men.

I assume that I could probably turn this book and open it at almost any page and find something that relates to sex in a manner which, in my opinion, is lewd and obscene.

Another one of the books is "Snow Job." It is the same here. This relates to an American soldier overseas. I have lost track, but again I would say that there is vividly described in each of the first three to four chapters the conduct of this soldier, each time with a different girl, leading up to the act of intercourse. And I suppose I can go through the rest of the book and continue to find references to sex, because that definitely seems to be what it is for:

"Lingering kiss on her lips." I merely just glance on: "Leave the light on. It is just more cozy."

I mean, I can open it at random and find something on almost every page. And in my opinion it shows what the purpose of that book is.

"She Made It Pay" is the title of one of the other books. This goes into a most vivid and lengthy description of the conduct of a couple, a white boy and, I believe, a colored girl leading up to a most vivid climax.

After I finished that I started to read the next chapter beyond those chapters, and I found that it starts off about two girls who are lying in a cozy bed, one girl gazing at the other, and that is about two homosexuals.

[fol. 208] I think that's enough as to the books. The title of one of the others is "Pleasures of the Torture Chamber," which gets back to the idea of sadism, and the other one I won't make reference to again because I have already done so.

Exhibit 10 consists of ten separate issues of a magazine entitled "Good Times." I am not going to comment on them for his reason—and I may be wrong in my notes as to what happened—but there is nothing to indicate that these particular magazines were being sold or offered for sale or were in possession for the purpose of sale.

No. 11 is another bound book, and it was separated from Exhibit 9 because of the fact that there is in this book a yellow printed slip which reads:

> "Important Notice: Due to circumstances beyond our control it was necessary to make substitution in your order. When we do so, we always substitute an item of a more select nature. We have done so in this case."

This book is about a psychiatrist who is using his ability in the touching of certain nerve centers, and so forth, to develop a sexual desire in any woman. Up to where I read it he had used it twice. I didn't go beyond page 49. And in that case it goes right on through to the final act and for a while afterward, and I consider it obscene.

[fol. 209] Referring to the stereo-views which are People's Exhibit 12, mentioned in one of the two brochures, there was a stock of these on the premises, and each box contains a stereo-viewer together with the slides. Each of these slides is that of a nude girl.

In the brief, reference is made that, as a matter of law, nudity in and of itself is entirely proper, and there is a citation that "Nudity in art has long been recognized as the reverse of obscene"; which is right, and the court goes along with that.

But let's consider specifically four of these slides and see if this is what would constitute art.

One of them is a girl, a nude girl kneeling, with one of those rubber ducks between her legs.

There is another one of a nude girl facing the camera, and there is a table or a counter before her on which there are two champagne glasses, and she has one breast in each of the two glasses—large breasts.

There is another nude girl who is lying in bed, wearing black lace stockings and gloves, in an unusual pose there. I think there has been comment made by artists as to what is the difference between art and obscenity, and I think one of them is putting stockings on a nude. However, skip that.

The next one is a nude girl facing toward the camera and looking over the top of a tennis net, and hanging over [fol. 210] the net on the camera side are her breasts, two very large breasts.

In my opinion, that is obscene.

People's Exhibit 14 consists of negatives, with four pictures to a page of prints from the negatives, each of two girls, and in each case one girl is whipping the other.

Mr. Maddox: Your Honor, may I interrupt for one moment so that I can be certain about something?

You referred a moment ago to the red-and-black circular and then I believe I understood the court to state that the slides were not connected to that circular. Did you make that statement?

The Court: I thought they weren't; they may be. But I glanced quickly at this, and I didn't see it.

Mr. Maddox: Well, your Honor made that statement, and that is why I wanted to be certain that I am following the record.

The Court: Do you wish to correct that?

Mr. Maddox: No, I just wanted to understand the court's position.

The Court: That's right.

Mr. Maddox: The stereo-view lens is not then on the red-and-black folder?

The Court: I do not think it is. It is on one of them.

Mr. Maddox: There is, your Honor, reference made to [fol. 211] a type of viewer, and there are two photographs—I mean purported pictures—there of women in the semi-nude. And do I have——

Mr. Nelson: This is on the same side of the page as "Tina's Torture," near the bottom of the page.

The Court: Yes. It says, "What a deal: Three-dimensional plastic stereo viewer plus pictures, pictures, pictures."

But as to connecting these particular pictures up to that ad, I don't know.

Mr. Maddox: I see. That's what I wanted to be certain of.

The Court: Yes, because it refers to these by numbers. No. 1 is: "Cute! but oh, my!"

2: "She knows her way around."

But I have no way of knowing that this refers to the specific slides that have been presented in evidence.

Now, as to that particular exhibit, it again is in the field of torture or spanking, and what I have already said about the other torture exhibits would apply here.

Now, as to Exhibits 18 to 23, in so far as they are exhibits of books or booklets or pictures, etc., I don't think it is necessary for the court to go into that. Those are the exhibits that were discovered at the residence on Strathmore.

So the court definitely is of the opinion that there has [fol. 212] been enough material presented to this court to satisfy the court that there is obscenity in some of it at least.

The court having found that there were obscene pictures and books in the possession and offered for sale by the defendants as charged, the next point that we must consider is whether they knew they were of an obscene nature, and did they, regardless of that, willfully and lewdly sell and offer for sale such material.

I don't think it is necessary for the court to take much time to express its opinion in that respect. The two brochures, in addition to the third brochure, which I have not

made reference to, which is People's Exhibit 22—but the two brochures that I have been referring to, People's Exhibits 2 and 3, clearly indicate what the defendants had in mind when they offered this merchandise for sale. As I said before, they were not offering these books for sale for the serious purpose of studying sex life by psychiatrists or doctors or whoever might have reason to consider it, but all the advertising, each and every one of the ads, is so worded as to create not only a desire for people to read this spicy stuff or look at this lewd material but, in my opinion, to excite these desires.

There is no question but that these defendants knew the contents of the books and pamphlets and that they did, with full knowledge of what those contents were, and commercializing upon that very fact, carry on their business of [fol. 213] offering them for sale.

So the court has gone into this rather at length to let you know what the court's position is, as the case now stands, and the court denies the motion.

It is now 12:00 o'clock and we can adjourn until 2:00.

Mr. Maddox: Very well, your Honor.

The Court: Are there any witnesses to be ordered back?

Mr. Nelson: None for the People, your Honor.

The Court: Any witnesses for the defendants?

Mr. Maddox: No. No witnesses to be ordered back.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.)

[fol. 214] Beverly Hills, California, Friday, June 10, 1955, 2:00 P.M.

The Court: People versus Alberts. You may continue.

By the way, Mr. Maddox, before continuing I would like to make one further comment concerning your trial brief. In that brief you make reference to a previous case that was in this court involving the same defendants, and you say, "it was the opinion of the Court that as a necessary element of the corpus delicti printed and picture material

being the subject of sale and advertising must be identified and related to advertisements and brochures."

And also you make reference to the fact that the City of Los Angeles does have a certain ordinance by which it is a misdemeanor to merely have possession without sale or offering for sale, which, of course, is true as to both the case that was in court and as to the city ordinance.

I may say, however, that naturally each case stands on its own feet, and the fact that the court had a prior case in this court involving matters of a similar nature would have no bearing on the case before the court now.

In so far as the reason that the court ruled as it did on the other occasion is concerned, that was because I didn't feel that the People had made a showing, which in my opinion on the case up to this point they have.

As to the city ordinance, we do not have such an ordi- [fol. 215] nance, and I will be frank to say that several years ago, and at approximately the time of that former case, I attempted to institute action that would result in the adoption of a county ordinance; but evidently I was unsuccessful and it wasn't adopted. And it may be as you say, that if there had been such an ordinance adopted we wouldn't be in court today here on this case. But, of course, that is not what the court must decide this case on; it must decide it on whether or not there is a violation of Section 311 of the Penal Code, and the court is not going to try to stretch Section 311 to take the place of an ordinance that has not been adopted.

I did want to comment on that other case.

Mr. Maddox: Very well, your Honor.

The Court: You may proceed.

Mr. Maddox: Mr. Fleishman, will you take the stand, please?

Stanley Fleishman, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Stanley Fleishman.

Direct Examination.

By Mr. Maddox:

Q. Mr. Fleishman, you are presently a member of the [fol. 216] law firm of Brock, Easton & Fleishman, is that correct?

A. That's true.

Q. And your offices are maintained in Hollywood at 1741 Ivar Avenue, is that correct?

A. Yes.

Q. Is Mr. Brock a former Superior Court Commissioner?

A. Yes.

Q. And you yourself are in active practice of the law, is that correct?

A. That's so.

Q. Of course you are a member of the California State Bar?

A. Yes.

Q. And are you also a member of the New York Bar?

A. I am.

Q. In what field of practice do you give your endeavors to clients?

A. It is a pretty general practice with, I suppose, a specialty in cases relating to post-office matters.

Q. Do you appear in court on frequent occasions?

A. Yes, I do.

Q. Do you know Mr. and Mrs. Alberts, the defendants, who are seated here at the counsel table?

A. I do. They are clients of mine in postal matters.

Q. How long have they been clients of yours in postal matters?

[fol. 217] A. On and off since 1950 or '51.

Q. During this time have there been any arrangements with your office or yourself on a retainer basis, or do they merely consult you occasionally?

A. At the present time they are on a retainer, and have been so since, I believe, October last.

Q. I see. It is a fact, is it not, Mr. Fleishman, that on one occasion you went before Justice Douglas of the United States Supreme Court in the matter of these defendants, is that right?

A. Yes; it was involving the Male Merchandise Mart Company of theirs.

Q. From the fact that you are in this business and you did go to the United States Supreme Court and have handled matters, I assume you know of the business that the defendants are engaged in?

A. Yes, I am familiar with it.

Q. What type of business would you say they are engaged in?

A. It is a mail-order business.

Q. And other similar businesses?

A. Certainly.

Q. Mr. Fleishman, has Mr. Alberts consulted you at different times concerning the mailability of any items and generally as to your legal opinion respecting obscenity under the law?

[fol. 218] Mr. Nelson: Your Honor, to which I shall object both generally to this line of questioning and specifically to this question on the ground that any advice or opinion which Mr. Fleishman has given or will give in the future, or opinion which he will give in this courtroom, is entirely immaterial to the proceedings before this court.

Mr. Maddox: I would like to be heard, your Honor, if I may.

The Court: You may.

Offer of Proof and Rejection Thereof

Mr. Maddox: It will probably save a lot of time if we can have this straightened out now.

It is my position, if the court please, and following your ruling involving the law on this, that if any merchandise that Mr. Alberts or Mrs. Alberts had was obscene and they knew it to be obscene, and, regardless of the knowledge of obscenity, advertised such material, irrespective of the manner of advertisement, that they would be acting lewdly, lawlessly, and wantonly. I believe that's the only conclusion the court can arrive at from reading the Fananstein case and the Wepplo case.

Now, it is our position, therefore, that the question of specific intent is a necessary ingredient here of the corpus delicti and must be established beyond a reasonable doubt.

Therefore it is the defendants' position that if these defendants acted as they believed themselves to be acting, lawfully, in such matters, they then did not have the specific [fol. 219] intent to advertise or disseminate through the mails, by brochure or otherwise, obscene matter. I think this is the very essence of the law in this matter, the specific intent involved under the Penal Code.

Now, regardless of whether or not a person may be mistaken in his belief or may have misunderstood certain advice, if they sincerely believed and were acting according to their best conscience in believing that they were not doing wrong, I say they do not have a specific intent to be lewd. That's our position here.

Mr. Nelson: May I be heard briefly, your Honor?

The Court: Yes.

Mr. Nelson: It strikes me that the point of this question is not whether they had a specific intent to do the act of which they are accused here, but rather whether or not they had a specific intent to violate a law and were advised of the law on the matter. And certainly it is not required that there be a specific intent to violate a law.

The Court: The position, then, that you would be taking, Mr. Maddox, is that because they had consulted Mr. Fleishman, who is an attorney and who engages particularly in the matter of advising clients relating to postal matters, that if he stated that this or that or the other is not obscene, why, then they can go ahead and it frees them of willfully, [fol. 220] unlawfully, and with intent violating Section 311?

Mr. Maddox: That, I think, is a pretty broad statement by the court, and I would have to further qualify that, because I don't believe that that would really be a proper way of presenting this in my offer of proof, because I don't think that would be good law.

The Court: Well, you may restate it.

Mr. Maddox: Maybe I can state it with some clarity here.

The Court: What case are you referring to?

Mr. Maddox: People vs. Wepplo. That decision has been previously cited and is in the memorandum.

In that case the defendant sold a book, and I refer to page 966 of the Wepplo decision, paragraph 8 on that page.

Reading the material matter: The defendant who sold the book but did not own the store was asked by her counsel in substance whether she had any lewd intent in making the sale, and an objection of the prosecution to this question was sustained. This was error. A witness may be examined as to the intent with which he did an act when that intent is material.

Citing other decisions, it says: "This is true even where the defendant is the witness and his intent is an element of the crime charged."

Now, here most certainly the element of intent is the subject matter that we must discuss, because under the [fol. 221] Penal Code the acts of the defendants must be willfully and, as we know, lewdly done.

Now, it is not my position that these defendants would just go to a lawyer and get some advice—and they might get some questionable advice—but they have gone to a specialist. And if they acted upon his advice that was reasonable, they can so state on the stand, and my purpose in having Mr. Fleishman appear here is to corroborate the defendants' intent.

The Court: Well, it is my opinion that if some of the material that has been introduced in this court is obscene or indecent, and the court has indicated that it so holds—and the court is acting again in accordance with People vs. Wepplo in that respect—that these defendants in themselves, without legal counsel, are in just as good a position to know whether the matters were decent or indecent, lewd, or obscene or whatever they may be. And I have looked at them, and in my opinion they are obscene, they are indecent, and I don't feel that they can shift the burden of having sold or offered them for sale, or relieve themselves of the willfulness in so far as they are concerned by passing it on to an attorney and doing it on his advice. And I am going to sustain the objection.

Mr. Maddox: Then, your Honor, I want to make a further statement in due respect to Mr. Fleishman: I want to make an offer of proof here that if I would ask Mr. Fleish- [fol. 222] man these questions and he were to answer them, he would not state that the particular material that this court has ruled to be obscene, that he gave advice that it

was not obscene. Most certainly Mr. Fleishman would not testify on those particular items that he advised the defendants that it was not obscene. He is a very capable counsel, and he would not advise any defendant improperly.

The Court: I don't follow you on this, Mr. Maddox. Do you mean that the witness, Mr. Fleishman, has advised the defendants on certain matters, as to writings or books and so forth that they have offered for sale, to obtain his opinion as to whether or not they were obscene, but as to the specific items before the court he did not advise them?

Mr. Maddox: Your Honor, you just stated that we couldn't shift the burden here on a lawyer to say that these things were not obscene, and I didn't want anyone to think that Mr. Fleishman was going to take the blame for any of them.

The Court: Well, I don't know. I don't know the value of his testimony if he didn't advise them with respect to these specific matters.

Mr. Maddox: Well, he has advised as to certain matters, but not as to these specific matters that the court ruled on this morning were obscene. But there are other matters.

[fol. 223] The Court: The court sustains the objection.

Mr. Maddox: So that we save Mr. Fleishman's time and the court's time, may I make an offer of proof here so that the court can rule accordingly?

The Court: Yes.

Mr. Maddox: I would attempt to elicit from this witness and from the defendants that certain particular matters were litigated before the United States District Court involving certain particular items that were subsequently inserted in the circulars and these brochures that have been introduced in evidence here as a part of the People's case; that adjudications were had in the United States District Court by Judge Peirson M. Hall and by Judge William Byrne, and that on one occasion they went to the United States Supreme Court; that these defendants acted upon those decisions wherein the court made certain rulings that nudes in particular of the type that this defendant was selling were not obscene, and that the defendants acted upon those decisions on legal matters that were before the United States District Court, and therefore made up these

circulars and went into business, and have sent the matter through the mail. And after having done so, of course, they were subsequently arrested on this charge.

The Court: You mean that as a part of that case there were specifically in evidence the same pictures and books as they have in this case?

[fol. 224] Mr. Maddox: Not all of them, your Honor, no; definitely not.

The Court: If that is your offer of proof, I sustain the objection.

Mr. Maddox: The witness may be excused.

David S. Alberts, one of the defendants, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: David S. Alberts.

The Clerk: Your full name, please.

The Witness: David Stephen Alberts.

Direct examination.

By Mr. Maddox:

Q. Mr. Alberts, will you state your residence address?

A. 1000 North Palm Avenue, Los Angeles 46.

Q. How long have you lived there?

A. About a month.

Q. And that is subsequent to the time that you lived out in West Los Angeles, is that correct?

A. That's correct.

Q. And you maintain a business here in Los Angeles County?

[fol. 225] A. I do.

Q. What type of business and where is it located?

A. A mail-order business at 8627 Melrose Avenue and a warehouse at 8733 Santa Monica Boulevard.

Q. Is that business carried on under any particular trade name or notation of identity?

A. It is under a corporation.

Q. When you say it is under a corporation, are you a member of the corporation?

A. I am not a stockholder but I am an employee of the corporation.

Q. What is the name of that corporation?

A. A P R Industries, Inc.

Q. Does that particular corporation maintain and operate this business?

A. It operates the sale of these items through the mails, yes.

Q. What part do you play in the management of that corporation?

A. Well, I have various duties, such as revising advertisements in magazines.

Q. Are you an officer of the corporation?

A. No, I am not.

Q. I see. Who are the officers of the corporation?

A. V. E. Stanard, also known as Mrs. Alberts, is secretary-treasurer. Richard Reed is president. I am not [fol. 226] familiar with the vice-president's name.

Q. But in any event, here, aside from any legal fictions, you are in charge of the business over there, isn't that right?

A. That's correct.

Q. How long have you been operating that business?

A. I have operated a mail-order business off and on since 1947.

Q. Well, there were times when you were out of business, is that right?

A. That's why I mentioned "off and on."

Q. How long have you been operating over here at this particular address on Melrose?

A. Approximately two years.

Q. I see. Now, associated with you in the business is your wife, present, and a member of this corporation, and she worked there?

A. Both.

Q. I see. And what is her general duty and what does she do in the business?

A. She maintains charge over the employees and expedites the sending out of customer-orders and takes care of the books and interviews help, and other similar duties of that nature.

Q. Does she operate independently or do you tell her what to do?

[fol. 227] A. I usually tell her what is to be done and she sees that it gets done.

Q. You direct her, then, in her activities?

A. Yes, I do.

Q. She does nothing then at any time except under your direction, is that correct?

A. That's correct.

Q. You have been here during this proceeding and you know of some of these matters that are before the court. Now, we have here certain exhibits that have been introduced in evidence. There are a group of books which the court indicates that it has examined. Some of those books are entitled, "Bitch on Wheels"——

Mr. Nelson: "Witch."

The Court: "Witch."

Mr. Maddox: Pardon me, your Honor.

Q. And also there is "Snow Job" and "She Made Him Pay," and I believe there is one book——

Mr. Nelson: "She Made It Pay."

Mr. Maddox: "She Made It Pay"?

Mr. Nelson: Yes.

By Mr. Maddox:

Q. And another book called "Sword of Desire." Do you know about these books?

A. How do you mean, know about them? You mean I know——

Q. Do you know that these books exist?

[fol. 228] A. Oh, yes.

Q. Have you ever seen these books?

A. Yes.

Q. Do you have these books either in the warehouse or in any of your places where you operate your business, such as the residence or even in the business office?

A. I had some in my business office, yes.

Q. You had some in your business office?

A. Yes.

Q. Do you know the names of the books that you had there?

A. I think it was those books which are in evidence, the "Snow Job"—I don't recall the titles, but the "Snow Job," "Sword of Desire"—those that you mentioned.

Q. All right. There were books here designated as People's Exhibit 9, which were five books, and I have attempted to state their names, and I didn't mean to be disrespectful, but I did state the names as I thought we had them written down. Were those books in your office?

A. They were, yes.

Q. Whereabouts were they in your office?

A. They were in a file cabinet, in a small filing cabinet.

Q. Why were those books in your office?

A. Those books were in my office because I sometime before purchased a job lot of books from the Arco Publish-
[fol. 229] ing Company at a very advantageous purchase price. However, I subsequently had an interview with one of the book salesmen, and in our course of conversation was advised that there was a cloud on one of the titles of the books, namely, "Sword of Desire," so I put a marker in this particular book of the samples I had in my office, to later discuss the matter with my attorney. And until I did so, I did nothing about the sale of the book. But that yellow slip was used as a marker to remind me that this particular book was the one that I had in question. I still had the rest of the books on the side from this same firm until I could get the matter cleared up to my satisfaction.

Q. Now, as you directed the business there, did you at any time direct these books to be advertised or sold?

A. Nowhere do they appear in any of my circularization, nor did I give any directions that they should.

Q. Where did you keep these books?

A. I kept them at the warehouse, but I kept them not on the general sales shelves, but in the storage section.

Q. Speaking of that warehouse, did you have that warehouse and the shelves more or less set up in consideration of what was mailable and what was not mailable, and what you did use in your business? You have just indicated that you put them on a certain shelf.

A. No, I put them on the side; not on a certain shelf. Not on the general merchandise shelves.

[fol. 230] Q. Then it is your testimony here that you have never advertised, nor have you at any time distributed or sold these books independent of an advertisement, is that correct?

A. That's correct.

Q. Do you personally, Mr. Alberts, know of the matter that is contained within the covers of those books?

A. No, I don't.

Q. Have you ever read the books?

A. No, I haven't.

Q Mr. Alberts, there has also been introduced in here as People's Exhibit 12 some stereo-slides and a stereoviewer, if I state that correctly? Now, have you at any time advertised and have you at any time sold any stereo-slides or stereo-viewer?

A. Yes, we have.

Q. Have you at any time examined the slides that you have sold, when you state you sold these slides?

A. Yes, I have.

Q. All right. This morning some reference was made to certain slides, wherein I believe the court stated that the court had read this material and also viewed certain slides, one particular slide where a lady had on some gloves, and I believe she was over some duck, and another one was where a lady was leaning over and her breasts were in some champagne glasses, and there was another slide where [fol. 231] there was a tennis net, and she was exposing herself in a vulgar manner by having her breasts over this tennis net. Were those slides ever sold?

A. Those slides were never sold by me. I can't swear—

Q. Were they in your stock and were they sold?

A. I don't know. I can't swear that they weren't, but I know I would never order them to be put in my stock. How they arrived there I do not know.

Q. These slides were found in this same cabinet, were they not?

A. No, sir, they were not.

Q. Were they any slides or stereo-viewer in that cabinet where these books were?

A: Yes, there were.

Q. Do you know if those are slides that have been introduced here as an exhibit?

A. I am not sure, but I had placed a few slides in my cabinet for perusal later.

Q. As a matter of fact, you were not in the Melrose address at the time that the arrest was made, is that right?

A. That's correct.

Q. Isn't it a fact that you keep this particular cabinet for questionable items there?

A. Definitely.

Q. And that is why the books were there, is that correct?

[fol. 232] A. That's right.

Q. And if any slides were there, were they there for that purpose?

A. That's what they were there for.

Q. Mr. Alberts, who makes up these brochures that have been introduced here as People's Exhibits 2 and 3, No. 2, I believe, being a red-and-white brochure, and No. 3 being a black-and-yellow brochure?

A. Those are made up by an advertising agency.

Q. And what is the name of the advertising agency?

A. Clifford Gill Advertising Agency on Wilshire Boulevard in Beverly Hills.

Q. Referring to the particular material that goes into these particular brochures, where did you get that material? I mean the advertising matter. Do you write it up or is it made up?

A. No, I do not write it up. The advertising agency writes it up.

Q. Is it your testimony, then, that you do not compose any of the material or the writing of the kinds that go into these brochures?

A. I am not a copywriter.

Q. You do none of that?

A. No.

Q. The people that you employ to do this, do they do

[fol. 233] general work along this line?

A. Yes.

Q. Where are they located?

A. On Wilshire Boulevard in Beverly Hills, the same Clifford Gill Agency.

Q. Have they made up brochures that have been introduced here as People's Exhibits 2 and 3?

A. Yes.

Q. Have you read the brochures?

A. I have glanced at them but I didn't read them.

Q. Well, you have glanced at them since the case has been filed?

A. I have.

Q. Before the time that the case was filed did you make any observation or inspection of any of these brochures in any detail?

A. Yes, I did.

Q. Did you do that on more than one occasion?

A. My usual procedure was that I would collect a series of items which I was going to use for a particular mail order merchandising program, have a conference with the advertising agency as to the items I wanted to sell and the price I wanted to receive for them, and they would write up what they call a rough layout, that is, the copy that would appear in the brochure, and outlining figures, words, and headlines. I would then consult with my attorney [fol. 234] about the rough form first, and he would then make any deletions as he saw fit.

I then would submit the revised rough copy back to the advertising agency, and they would make up a final setup in type exactly as it would be printed.

I would then have another or final conference with my attorney on the matter, and if it was then O.K. I would proceed to have it printed.

Q. When you say you had conferences with your attorney, did you seek the advice of Mr. Fleishman?

A. Yes, I did.

Q. Did you also seek the advice of another attorney?

A. Yes, I did.

Q. What is the name of the other counsel that you spoke to?

A. Stanley Caidin.

Q. And he is located here in Beverly Hills, is that right?

A. Yes, he is.

Q. Is there any particular reason that you spoke to Mr. Caidin about this?

Mr. Nelson: Your Honor, I will object to that question on the ground it is irrelevant and incompetent to any of the issues in this case.

The Court: Do you wish to make any offer of proof?

Mr. Maddox: No, your Honor, except to his effort to try [fol. 235] to do this in a lawful manner.

The Court: Objection sustained.

By Mr. Maddox:

Q. Did you at any time take these matters up with the Post Office Department, Mr. Alberts?

Mr. Nelson: The same objection, on the ground it is immaterial, your Honor.

By Mr. Maddox:

Q. Mr. Alberts, there is a list of some 23 books, and the titles of these books are set forth in People's Exhibit 3. Do you know the contents of those books?

A. No, I do not.

Q. Do you have any general knowledge of the subjects those books contain?

A. General knowledge as to what they contain?

Q. Yes, what type of reading material is found in these books. Do you know about the books?

A. Yes.

Q. How long have you been advertising the books?

A. Since February of nineteen——

Q. Approximately. You don't have to be exact on it.

A. I have a date here. Since February of 1954.

Q. Did you act lewdly in advertising these books, Mr. Alberts?

A. No, I did not, because I know of the reputation of the publisher of those books.

Q. Who is the publisher?

[fol. 236] A. E. Haldermann-Julius of Girard, Kansas.

Q. With reference to these brochures, People's Exhibit 3, after you had had this made up and, as you state, sub-

mitted it to certain persons and discussed it, did you act lewdly in sending out through the mails?

A. No, I did not.

Q. With reference to People's Exhibit 2, which is the red-and-white brochure, you state that you had that made up also, is that correct?

A. That red-and-white circular was made up from another red-and-white circular as a direct result of a court proceeding in front of Judge Peirson Hall.

Mr. Nelson: If your Honor please, I move to strike the answer.

Mr. Maddox: I will withdraw it.

Q. My question was whether you made up this brochure. You stated you made up this brochure, and I just wanted to save time.

A. Yes.

Q. Did you follow the same procedure in making up the red-and-white brochure that you did in the green-and-black?

A. Yes, sir.

Q. You sent this out through the mail yourself, or did you direct to be sent out of your establishment?

A. I directed it to be sent out of my establishment.

[fol. 237] Q. And when you did that did you act lewdly?

A. No, I did not.

Q. There is a particular item set forth here in this brochure, called "Tina's Torture." Have you ever read through all of those cartoon strips?

A. No, I did not.

Q. Do you know what they contain?

A. Not specifically, no.

Q. Did you intend to insert them into this brochure for any lewd purpose?

A. No, I did not.

Q. There is also an item set forth here, "Beauty in Bondage." Did you at any time insert that into the brochure for a lewd purpose?

A. No, I did not.

Q. Reference has also been made here to "Olga's Recruits." Did you at any time send out through the mail

that particular group of cartoons or direct it to be done?

A. I directed it to be done, yes.

Q. Did you know the contents and did you read all of the matter and pictures that were set forth in those cartoons?

A. No, I did not.

Q. In keeping this merchandise on Melrose Avenue and in keeping this merchandise in stock on Santa Monica Boulevard did you do so for any lewd purpose?

[fol. 238] A. No, I did not.

Q. Did you advertise any material that we have in evidence here, or at any time while you conducted this business advertise any of these matters, in a lewd manner?

A. No, I did not.

Q. Did you ever distribute, yourself, or direct anyone to distribute any of these items in a lewd manner?

A. No, I did not.

Q. At any time did you ever design or draw or copy or engrave or make any of these particular figures or set them forth for a lewd purpose?

A. No, sir.

Mr. Maddox: You may cross-examine.

Cross examination.

By Mr. Nelson:

Q. Mr. Alberts, you have stated that you did not do any of these acts that are alleged against you for a lewd purpose. Will you tell the court what is meant by "lewd"?

A. To my mind "lewd" means something in violation of the law.

Q. In other words, what you meant when you said you didn't do this in a lewd manner was that you didn't do anything intending to violate the law?

A. No, I meant that was against the law.

Q. And you didn't want to violate the law?

[fol. 239] A. No, naturally.

Q. However, you did intend to send these brochures through the mail, did you not?

A. Did I intend to?

Q. Yes.

A. Yes, sir.

Q. And this was a profit-making venture? That is, you sent the brochures out and you were to get orders to send other things?

A. That's right.

Q. And then you intended to send the other literature out on receipt of the orders, is that correct?

A. Which other literature?

Q. The requests that had been made on the forms that were to come back to you for the merchandise.

A. Yes.

Q. Referring to this little yellow sheet that you inserted, according to your testimony, in the volume "Sword of Desire," what is on that slip of paper?

A. I don't know the exact wording, but it is a form we use when a customer sends in a sum of money and we don't have the particular item in stock, we substitute another item from the catalog with a larger retail value, so that the customer will be satisfied by getting a higher-priced item then, though it wasn't the exact item he ordered.

Q. Were those little slips printed by you or under your [fol. 240] direction?

A. Yes.

Q. Those little yellow slips?

A. Yes.

Q. Is there any of your own handwriting on that slip that you put in the front of the book "Sword of Desire"?

A. I would have to examine the slip.

Q. Do you recall whether or not you wrote upon it?

A. I don't recall.

Q. Mr. Alberts, it is a fact, is it not, that you have been in this and other courtrooms before concerning matters which include the holding for sale of literature of this type? Is that not true?

A. That's correct.

Q. And you have been complained against in these courts as a defendant; is that not true?

A. I have been a plaintiff and a defendant.

Q. But in a criminal action you have been a defendant regarding some of the material, not necessarily the same material, but material of this nature?

A. Yes, I was.

Q. And this has been going on for some length of time, more than five years, would you say?

A. Well, I was arrested on a city ordinance, 41.01, in 1949.

Q. Was that the first time?

[fol. 241] A. That was the first time I was ever arrested.

Q. All right. Now, since that time have you reviewed the stock of merchandise you had on hand to determine whether or not you were going to be violating a law?

A. Yes.

Q. And it is because you felt that you were not going to be violating the law that you say you were not acting lewdly?

A. It is because of receiving certain advice from counsel and certain court determinations.

Q. Wait a minute. You realized that you were pretty close to the line, didn't you?

A. I repeat, it is because of—

Q. Wait a minute. If you don't feel like you can answer the question, just say you can't answer it.

Did you realize that you were pretty close to the line of violating the law?

A. I can't answer that.

Mr. Nelson: No further questions.

Mr. Maddox: May I have permission to ask the witness several questions on direct that I neglected to ask?

The Court: Proceed.

Direct Examination (Continued).

By Mr. Maddox:

Q. There are some 20 packets of pictures here indicating [fol. 242] women tied in a barber chair. They are People's Exhibit 6. Are you familiar with those particular type pictures, Mr. Alberts?

A. Yes.

Q. And you know that they are in your stock?

A. Yes.

Q. Did you act lewdly in selling or holding out for sale those pictures?

A. No.

Q. Did you advertise those pictures in any particular way that you considered to be lewd?

A. No.

Q. There is also the item here of certain girls, which is People's Exhibit 14, and it is designated by the People as "spanking photographs" or such. Did you at any time know what those pictures were?

A. No. I couldn't tell you which ones were which. They were just some rhubarb photos we had in stock.

Q. You say "rhubarb"?

A. "Rhubarb" is a phraseology in our business. It is a tussle. These two girls are tussling, and therefore we call them rhubarb photos.

Q. You have no particular recollection of any particular pictures but there are pictures in stock, is that correct?

A. That's correct.

[fol. 243] Q. Would you say in any of these pictures you acted lewdly in keeping them for sale or in selling them or advertising them?

A. No.

Q. By the way, Mr. Alberts, can you tell us generally how many items you have in stock which you sell?

A. Generally several thousand.

Q. Have you examined all of those items yourself?

A. No.

Q. Do you employ people to do that?

A. Generally, yes.

Q. Who are those people?

A. Well, I employ legal counsel when I think the situation arises, and—

Q. Do you have clerks?

Mr. Nelson: Your Honor, I think I will move to strike that answer on the ground it is not responsive to the question.

The Court: It may be stricken.

By Mr. Maddox:

Q. Who are the people that you employ in your business and what are their duties? I don't mean their names, but generally what are they, clerks?

A. They are shipping room help and they are receiving department help. I don't bother with that particular phase of the business. I have people who are competent to take care of all the particular phases of that particular thing.

[fol. 244] Q. Now, there has been some evidence here about some "Good Times" magazines which I believe were found in your home. Do you know the contents of those magazines?

The Court: They weren't found in the home.

Mr. Maddox: I thought they were found there. I didn't mean to misdirect, your Honor.

Q. They were found at the Melrose address?

A. Yes.

Q. Do you know what those magazines contain?

A. No, I do not. I just subscribe to it because it is published by a competitor, and it is good practice to subscribe to a competitor's publication in order to find out what they sell.

Q. Referring to these items that you have in stock, are they items that you subscribe to?

A. That's my practice. I subscribe to anything and everything and answer all the ads that I can in the magazines which advertise rhubarb or tussle photos and various movies and books and things of that nature, in a research endeavor.

Mr. Maddox: I have no further questions.

Mr. Nelson: Nothing further, your Honor.

You may step down.

[fol. 245] Violet E. Stanard Alberts, a defendant, called as a witness in her own behalf, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Violet E. Stanard Alberts.

Direct Examination.

By Mr. Maddox:

Q. You are the wife of the defendant David Alberts?

A. Yes.

Q. Do you work in the business that Mr. Alberts operates?
A. I do.
Q. You are also there daily?
A. Every day.
Q. Who is your immediate superior?
A. I work with my husband and do as he advises.
Q. Do you have any particular duties that you follow?
A. Certainly.
Q. What are those duties?
A. I am the secretary-treasurer of the corporation. I take care of the bookkkeeping, supervising of help, shipping of orders, and incoming mail, and various duties of that nature.
Q. Will you keep your voice up, please?
A. Yes, sir.

[fol. 246] Mr. Maddox: Counsel, I wonder if, to save time here, I go down all of these items and ask this witness whether or not she acted lewdly—and I believe that she would so testify, that she didn't—if you would stipulate that she would so testify? If so, I would have no further questions to ask this witness.

Mr. Nelson: Yes, I would be willing to stipulate that she would so testify.

The Court: The record will show the stipulation.

Mr. Maddox: You may cross-examine.

Cross examination.

By Mr. Nelson:

Q. Mrs. Alberts, do you receive a salary for your employment or do you receive a share of the profits?
A. I receive a salary.
Q. Mrs. Alberts, would you tell us what the word "lewd" means to you?
A. To me the word "lewd" means to do something that is—to be acting in a manner which would be more or less questionable or otherwise against the law.
Q. In other words, in doing these acts you did not intend to violate a law?
A. No, sir, I did not.
Q. However, you did perform these acts that you did

around the place of business intentionally? That is, you [fol. 247] intended to mail out certain items?

A. Yes, sir, I did.

Q. And to take care of the other items that you testified on direct examination that you were to handle?

A. Exactly.

Mr. Nelson: No further questions.

Mr. Maddox: I would like to ask one or two questions, your Honor.

Redirect examination.

By Mr. Maddox:

Q. With reference to the books here that have been referred to as "Witch on Wheels," "Snow Job," and the others—there are five in number—do you know if you ever mailed those out in the course of your business?

A. No, they have never been mailed out.

Q. They are in stock?

A. Yes, they are, some of them. I don't know that all you mentioned are in stock.

Q. Referring to the slides that were referred to here this morning, which are exhibits where certain women were in poses that the court considered to be obscene, were those particular slides in stock, do you know?

A. I saw the exhibit, and some of them were but some of them were not. Some of them I had definitely not seen before, and I cannot explain how they obtained them at the [fol. 248] so-called warehouse at 8733 Santa Monica.

Q. Did you ever send out in the course of your duties there any slides similar to that?

A. No.

Q. You have examined the slides that you have?

A. Yes, I have.

Mr. Maddox: No further questions.

Mr. Nelson: No questions.

Mr. Maddox: The defense rests.

The Court: Any rebuttal testimony?

Mr. Nelson: No rebuttal, your Honor. The People rest. Does your Honor wish to hear argument upon this?

The Court: It is entirely up to you gentlemen.

Mr. Nelson: I thought we had argued ourselves out in the business of the motion that was made in the middle of the trial.

The Court: That is entirely up to you, Mr. Nelson. If you wish to waive opening you may do so.

Mr. Nelson: I would like to mention one or two things.

(Argument by counsel for the People.)

(Short recess.)

(Argument by Mr. Maddox for the defendants.)

(Closing argument by Mr. Nelson for the People.)

VERDICT

The Court: Considering the defenses presented first as to David S. Alberts, the testimony has been offered to the effect that the five books which compose People's Exhibit 9 [fol. 249] were never sent out nor held for sale there in the stock of books that were purchased by the Alberts when he found out there was a cloud on them; yet one of those books which was offered in evidence as a separate exhibit, People's Exhibit 11, "Sword of Desire," includes with the book as part of the exhibit a yellow slip which Mr. Albert's testimony admits is a form used by his company where they sometimes will send out a substitute for what a person may have ordered, and usually it is something that is more expensive. This slip is in the book "Sword of Desire."

Mrs. Alberts stated when questioned about the matter of these books as to whether they were in stock, "Yes, some of them were in stock."

The defendant has offered testimony that as to the slides offered as People's Exhibit 12, those particular slides which the court described and classified as obscene, they were not being held for sale or offered for sale. And yet the testimony of the officer is that the one presented or the set presented in court as evidence is only one of, I think he said, six or more that he had recovered. The court is not satisfied with the defense that Mr. Alberts presented in that respect, nor with his testimony as to not having any lewd intent. He defined what "lewd" meant to him, and I think that's what it means: a person who will get as close to the line as he can without going over, and if he doesn't go over, why, then he figures that he is within the law. But as

[fol. 250] far as whether or not the particular matter may be lewd and he may be distributing or offering for sale something that is lewd, the fact that in itself it is lewd does not concern him or does not bother him except to the extent that it may result in his being arrested. He has gone through years of experience with this business where the record shows from his own admissions that he has faced this situation on prior occasions. And his own testimony was interesting in the matter of some of the questions that were asked of him on cross-examination by the prosecutor in relation to this matter of "lewd" and this matter of advice of counsel and so forth. He would indicate that he didn't know what the contents of a lot of these exhibits were, and yet his testimony is that he is the one who ran the business; he is the one who evidently purchased the merchandise that was to be offered for sale by his company and by him; he is the one who did that, and it is inconceivable that a man who is doing that would buy in large quantities books or strip cartoons or films or anything else without having read them so that he would know that it was something that would appeal to the clientele that he wanted to reach, the clientele which he attempts to describe in his brochure, People's Exhibit 3, as "mature men of clean minds." And yet in the same brochure he states that they will make every possible effort to prevent these books from reaching young people or persons who would use them in the fulfillment of indecent desires.

[fol. 251] So far as the defense presented by Mr. Alberts is concerned, it has not altered the position of the court expressed when the People rested, and that is that the People have proven their case beyond a reasonable doubt as against the defendant David S. Alberts on Counts 1 and 2.

As to Violet E. Alberts, she is the wife of the defendant Alberts. Everything indicates, all of the testimony and past records of other actions referred to in court here today, that the moving spirit in all of these matters, whether it be local or federal or what it may be, is David S. Alberts. She is in the employ and she is his wife, and I feel that as to her possibly a situation exists which creates a reasonable doubt whether she of her own volition is criminally liable so far as the holding and possession of these items is concerned.

I find the defendant David S. Alberts guilty on Counts 1 and 2, and I find the defendant Violet E. Alberts not guilty as to Counts 1 and 2. Bail exonerated as to Violet Alberts.

Mr. Maddox: If your Honor please, the defendant waives time for sentence and asks leave of court to have this matter continued for sentence, and the defendant waives any statutory time as to sentence. The matter can be put over possibly for two weeks. Today is the 10th.

The Court: The regular sentence date would be on a [fol. 252] Tuesday, the 21st. Is that too soon? That's eleven days.

Mr. Maddox: Yes, your Honor. Would your Honor prefer to have this matter referred to the Probation Department?

The Court: Personally I have no desire to refer it to the Probation Department.

Mr. Maddox: Very well. I concluded that would be the court's feeling. So if your Honor could put it over for at least two weeks, there are some matters that I would like to go into, and I have one trial in the next several days.

The Court: Two weeks from today would be the 24th of June.

Mr. Maddox: That's satisfactory.

The Court: We will continue it to that time, on the 9:00 o'clock calendar on June the 24th. The defendant to remain upon bail.

The record shows that the defendant Alberts waives time for sentence.

Mr. Nelson: Your Honor, concerning the property received under the search warrants, which is in our custody as a part of the search warrants, I wonder if we may have some order as to the disposition of that property?

The Court: Well, I will have to review again the inventory as to just what we are holding.

Mr. Maddox: I would suggest it all be held over until the 24th if it is convenient to have it held that way. Is that all right?

[fols. 253-254] Mr. Nelson: It has been a long time now, so a few days more won't hurt.

The Court: All right, we will bring it up at that time.

(Whereupon, at 3:55 p. m., the trial in the above-entitled matter was concluded.)

[fol. 255] Judge's Certificate to Transcript on Appeal

I hereby certify that the foregoing transcript on appeal, consisting of 152 pages, is full, true, and correct, and the same is settled, allowed, and made a part of the record in this case.

Dated this 12th day of August 1955.

Charles J. Griffin, Judge.

[fol. 256] Reporter's and Clerk's Certificates to foregoing transcript omitted in printing.

[fols. 257-258] State of California,
County of Los Angeles, ss.

[fol. 259] Supreme Court of the United States, October Term, 1956

No. 61

David S. Alberts, Appellant

vs.

State of California

Appeal from the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Order Noting Probable Jurisdiction—January 14, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is consoljdafed with Nos. 107 and 582 and a total of three hours allowed for oral argument.

"Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance, * * *

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

Note: The Court in its charge to the jury (Record page 579) applied this language as the law applicable to the crimes charged in the Indictment.

An Act of June 28, 1955, 69 Stat. 183, amended 62 Stat. 768, 18 U. S. C. §1461,

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, devise, or substance; and * * *

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails

for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination. As amended June 28, 1955, c. 190, Secs. 1, 2, 69, Stat. 183."

6. Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Statement of the Case

This prosecution originated in an Indictment which was found by the Grand Jury in the United States District Court, Southern District of New York, on the 20th day of July, 1955. The multitudinous indictment contained twenty-six counts, charging the defendant with wrongfully depositing for mailing and delivery certain matter alleged to be in violation of Title 18 U. S. C. §§2 and 1461, 62 Stat. 768, and a conspiracy count under §371, 62 Stat. 701.

The case came on for trial before the Hon. John M. Cashin, D. J., and a jury, on the 3rd day of January, 1956, and was concluded on the 12th day of January, 1956. In the course of the trial counts 12 and 25 of the indictment were dismissed on motion of the defense counsel with the Government's consent. Count 26, the conspiracy count, was dismissed on motion of the defense counsel after argument. The case went to the jury on the 12th day of January, 1956. They returned a verdict on that day finding the defendant guilty on but four counts, 10, 13, 17 and 24, and

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IN THE

Supreme Court of the United States

No. 582

SAMUEL ROTH,

Petitioner.

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

DAVID VON E. ALBRECHT,
DAVID P. SIEGEL,
Attorneys for Petitioner.

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IV.—Besides the reasons otherwise set forth in this application, there are special and important reasons for the granting of the writ of certiorari in this case, since there is great national concern over the question of the protection of the publisher, distributor, writer or individual under the First and Fifth Amendments to the Constitution involving the question as to whether or not these amendments do not protect against "obscenity" prosecutions and as applied under the circumstances of this case.

There is pending before this Court (sub judice) Butler v. Michigan case (a Detroit, Michigan case) and there is docketed before this Court the Alberts and Kingsley cases from California and New York showing the present national interest in relationship to the application of the First Amendment to the Constitution and other appropriate Constitutional protection against obscenity laws.

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IN THE

Supreme Court of the United States

No. .....

SAMUEL ROTH,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner, defendant below, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on September 18, 1956.

Opinions Below

The opinions of the Court of Appeals for the Second Circuit are not yet reported but are reproduced in the Appendix, *infra*, pages 2281-2341. The United States District Court for the Southern District of New York issued no opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 18, 1956 (Appendix, *infra*, pp. 2342-2343). By order of Mr. Justice Harlan entered on October 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including No-

vember 17, 1956 and the defendant was placed on bail of $5,000.00.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech and freedom of the press guarantees of the First Amendment?

2. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?

3. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?

4. Did the trial court in its charge to the jury so dissect and oppose the collocation of terms in 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183 so as to render the statute vague and indefinite?

5. Did the trial court err in denying the motion of the defendant to suppress the evidence submitted under Counts 17 and 24 because such evidence was obtained without probable cause and by trick?

6. Was the federal district attorney's argument to the jury so inflamatory and prejudicial as to deprive the defendant of the fair trial contemplated by the Due Process Clause of the Fifth Amendment?

7. Was the trial court's charge as to the interrelationship of the different counts in the indictment so inconsistent as to make the verdict of the jury erroneous?

8. Were the publications, when considered in their entirety, obscene?

Constitutional and Statutory Provisions Involved

1. First Amendment.

> "Congress shall make no law • • • abridging the freedom of speech, or of the press • • •."

2. Fifth Amendment.

> "No person shall • • • be deprived of life, liberty, or property, without due process of law • • •."

3. Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. 62 Stat. 768, 18 U. S. C. §1461 (derived from R.S. §3893, and originally passed as §148 of an Act of June 8, 1872, 17 Stat. 302). *Mailing obscene or crime-inciting matter.* This statute, upon which the Indictment is based, before its amendment, on June 28th, 1955, provided, insofar as pertinent, as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, papers, letter, writing, print, or other publication of an indecent character; and
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, • • •

not guilty as to the remaining nineteen counts of the indictment.

The judgment of the Court was rendered on the 7th day of February, 1956. The Court imposed a sentence on the defendant-petitioner of five years and a fine of $5,000 on count 10 (the defendant to be committed until such fine be paid), and sentenced him to a like term on counts 13, 17 and 24, running concurrently with the sentence of five years on count 10, and fined the defendant-petitioner $1 each on counts 13, 17 and 24, which fines of $1, however, were remitted.

The Government called in all some twenty-three witnesses. Of these witnesses, nineteen testified as to counts which were either dismissed, or as to which the defendant was found not guilty, and only four witnesses, including a Government inspector and postmaster, were heard as to the four counts on which the defendant was found guilty.

The Government put in evidence some thirty-five exhibits, which were read in whole or in part to the jury and which, of course, had a cumulative effect upon the jury, although out of the thirty-five only seven exhibits refer to the counts on which the defendant was found guilty. It will be seen that there was a preponderance both of witnesses and exhibits who, due to this multifarious indictment, were heard against the defendant on counts on which he was found not guilty.

It will be noted that in 18 U. S. C. §1461 as amended June 28, 1955, the words characterizing the obscenity as:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;"

included "indecent" and "filthy" in a single characterization. There was no disjunctive between lasciviousness and the words "indecent" and "filthy". Furthermore, it will be noted that both sections as they appeared at the time of the indictment and trial and before contained an artificial definition of the term "indecent" in the following language:

> "The term 'indecent', as used in this section, includes matter of a character tending to incite arson, murder, or assassination. * * * *"

No reference was made by the Court to this specific legislative definition.

The Court of Appeals for the Second Circuit affirmed the judgment of the Court below but it felt constrained to refuse to consider the claim of the unconstitutionality of 18 U. S. C. §1461 on the ground that any such claim, as to this statute, was one for this Court alone.

Chief Judge Clark in the course of his opinion took occasion to say that the trial judge in imposing sentence pointed out that the defendant had been convicted several times before under both state and federal law (App. 2288). The petitioner contends that there was no basis in the trial record for this statement. He did not take the stand, so he did not give his side of the controversy. At the time of sentence, Judge Cashin did refer to the fact that defendant had been convicted on a number of occasions.

The defendant claimed before this Court that his previous encounters with the law arose as a result of his publications. Those cases in which he was convicted involved the sale of *Ulysses* by James Joyce, a book which was subsequently held to be not obscene in *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (2nd Cir. 1934) *affirming* 5 F. Supp. 182 (D. S. D. N. Y. 1933); the English version of Arthur Schnitzler's *Reigen*, a movie from which, under the title La Ronde, was permitted circulation by this Court in *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954); Sir Richard Burton's translation of *The Perfumed Garden*, a classic fourteenth century Arabic work; *American Anecdotes*, stories which are now available to the public; a translation of *The Anaga Ranga*, a famous Hindu classic dealing with the art of love in the style of the Latin Ovid; and two stories by Boccaccio that can now be obtained at the Public Library and purchased in any book store. His other engagements with the law, in which he obtained dismissals, involved the publication

of Benjamin Franklin's essay entitled *To a Young Man on How to Choose a Mistress; Celestine,* which is the English version of *The Diary of a Chambermaid* by Octave Mirbeau, and which the public library now have available on its bookshelves with an introduction by Jules Romaine; and *Beautiful Sinners of New York.* The defendant has written for such newspapers and magazines as the *Nation, Harper's Weekly, The Daily Mail, The Jewish Chronicle of London, The Boston Transcript* and *The New York Herald.* He is the author of several books, among them *Europe.* published by Liverright; *Now And Forever,* published by Robert McBride Co.; *A Study In Consciousness,* with an introduction by Sir Arthur Eddington, the great English philosopher and mathematician. The defendant is also the editor of Voltaire's *Philosophical Dictionary.* He has long been an important figure in the defense of free press freedoms.

REASON$ FOR GRANTING THE WRIT

I.

The Court of Appeals for the Second Circuit in sustaining the validity of the Federal Obscenity Statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) has decided an important question of Federal Constitutional Law upon which this Court has never squarely or directly passed, and which should be settled by this Court.

The federal obscenity statute involved in this case, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, derives from an act originally passed in 1872, more than three-quarters of a century ago, as a result of the efforts of that feverish Puritan, Anthony Comstock. By virtue of an intensive campaign in which he denounced opponents as lechers and defilers of youth and American womanhood, he succeeded in urging his bill through a busy Congress on the final day of its session. See Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 65 (1938). How-

ever, unlike other frenetic legislation which became dead in letter as in spirit (See e.g., *United States* v. *Williams*, 341 U. S. 70), this statute has not become a Victorian vestigial remainder, but has been actively and frequently enforced, recently amended (See 69 Stat. 183), and promised vigorous prosecution for the future. (See Report of the Select Committee on Current Pornographic Materials, H. Repres., 82nd Cong., pursuant to H. Res. 596 (1952).)

Despite the vitality as well as antiquity of the federal obscenity statute, this Court has never squarely considered or directly passed on the constitutionality of this statute. As Circuit Judge Frank in his concurring opinion in the Court below said:

> "True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved." (Appendix 2293.)

See also Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. R. 295, 301, 352-358 (1954); Cushman, *National Police Power under the Postal Clause of the Constitution*, 4 Minnesota, J. L. Rev. 402, 411 (1920); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 729 (1938).

This Court has decided cases involving obscenity statutes where the validity of the statute was not challenged [see, *e.g.*, *United States* v. *Alpers*, 338 U. S. 680 (1949)], and in dicta has commented favorably on such statutes [see, *e.g.*, *Winters* v. *New York*, 333 U. S. 57, 510 (1948); *Hannegan* v. *Esquire*, 327 U. S. 146, 158 (1946)], yet when the issue of the compatibility between a state obscenity statute

and the First Amendment was precisely raised and argued, the Court was equally divided and wrote no opinion. *Doubleday* v. *New York*, 335 U. S. 848 (1948). Indeed, on the most recent occasion this Court had to consider the constitutionality of obscenity legislation, it held, at the last term, in a *per curiam* decision, that a state obscenity statute relating to motion picture films was unconstitutional under the First and Fourteenth Amendments, saying simply: "Judgment reversed. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Superior Films* v. *Dept. of Education*, 346 U. S. 587." *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 282 Pac. 2d 412.

The federal obscenity statute is nothing less than an assertion of federal criminal power over the contents of matter carried in the mails. In the series of cases beginning with *Burstyn*, this Court acknowledged the issue of state power over the contents of a mass medium, the motion picture film, as so important and so ripe for resolution as to warrant review. We believe that federal power over the contents of the press poses issues surely no less grave or unresolved. If it was appropriate for this Court in the motion picture cases to measure the respective values inhering in the conceded interest of a state in preserving morality and the First Amendment freedoms applicable only derivately through the Fourteenth Amendment, then it is urgent for the Court to evaluate and determine the conflict between the disputed federal power to safeguard morality and the freedom of the press as directly guaranteed by the First Amendment.

This case evokes issues which are timely, which are unsettled, and which are of heavy significance to all who use the mails to disseminate published utterances; the writ should issue.

II.

The Court of Appeals for the Second Circuit in sustaining the validity of the federal obscenity statute has decided a federal question in a way in conflict with applicable decisions of this Court in the past twenty-five years.

For nearly the first 130 years of its existence there were no important cases involving the freedom of speech and of the press guarantees of the First Amendment. As Chief Justice Vinson pointed out in *Dennis* v. *United States*, 341 U. S. 494 (1951):

> "No important case involving free speech was decided by this Court prior to Schenck v. United States, 1919, 249 U. S. 47." At 503.

It was not until the prosecutions resulting from World War I that the Court began to explore the implications of the constitutional guarantee for freedom of expression. And it was not until after the opinions of Chief Justice Hughes for the Court in *Stromberg* v. *California*, 283 U. S. 359, and *Near* v. *Minnesota*, 283 U. S. 697, in May and June 1931, that the First Amendment freedoms received their sturdiest development. Since that time, however, there have been many decisions invalidating various kinds of legislation as violating those First Amendment freedoms. An example at the last term is *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 283 P. 2d 412, in which the Court struck down an obscenity statute of the State of Kansas. Another recent example is *Winters* v. *New York*, 333 U. S. 507 (1948), *reversing* 294 N. Y. 545, in which the Court invalidated a portion of an obscenity law of the State of New York. If the reasoning in these and in numerous other recent decisions of this Court is applied to the federal obscenity statute in the instant case, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, then this statute must be held to be unconstitutional as violating the freedom of the press guarantee of the First

Amendment and the due process clause of the Fifth Amendment. As Circuit Judge Frank stated in his concurring opinion in the Court below:

> "* * * I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years, relative to the First Amendment as applied to other kinds of legislation." Appendix 2291.

However, he went along with his colleagues on the ground that the invalidation of this statute was the business of this Court.

A.

The federal obscenity statute violates the freedom of speech and of the press guarantees of the First Amendment.

The founders of this country, out of an abundance of caution, expressly provided: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." They meant just that. In the past twenty-five years the Court has been approaching the intent and purpose of the First Amendment.

Legislation affecting freedom of speech or of the press, to be valid, must fall within certain narrow exceptions. The words must be such as are likely to incite to a breach of the peace [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942)], or such as have a sufficient probability to result in the overthrow of the government by force and violence [*Dennis* v. *United States*, 341 U. S. 494 (1951)]. Federal obscenity statutes do not fall within any of the narrow exceptions which the decisions of this Court have established.

There is no reasonable probability that allegedly obscene publications or pictures have any appreciable effect on the conduct of men, women or children. It is often assumed that so-called obscene publications or pictures will cause sexual delinquency. The truth of the matter is that we do

not know. The Court of Appeals of New York pointed this out recently:

> "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, *e.g.*, Jahoda and Staff of Research Center for Human Relations, New York University [1954]. The impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)" *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, n. 3, 151 N. Y. S. 2d 639, n. 3 [1956].

Such evidence as there is tends to indicate that neither publications nor pictures have much if anything to do with sexual or juvenile delinquency. Reference may be made in this connection to two studies, one by the Bureau of Social Hygiene of New York City and the other by the American Youth Commission, on young people in Maryland. Both studies bear out the fact that the sex education of the young comes from other sources than publications. Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 72; Bell, *Youth Tell Their Story*. The Bureau of Social Hygiene of New York City sent questionnaires to 10,000 college and normal school women graduates, 1,200 answers were received. Not one specified a "dirty" book as the source of sex information. Of the 409 replies in answer to the question as to what things were most stimulating sexually, the majority noted very simply, "man". The American Youth Commission for its study took Maryland as a typical state and interviewed 13,528 young people there. This study showed that the chief source of sex education for the youth of all ages and all religious groups was youth's contemporaries. Only 4% reported that they owed most to books.

A recent summary of studies on juvenile delinquency by professors Lockhart and McClure in *Obscenity In the*

Courts, 20 Law & Contemporary Problems 587, 596 (1955), contains these conclusions:

> "(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree

to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

Circuit Judge Frank quoted these conclusions and covered the authorities on this subject in the appendix to his concurring opinion. Appendix 2313-2321.

The federal obscenity statute, on its face does not fall within any of the narrow exceptions to the First Amendment; and there is no reasonable probability that allegedly obscene publications generally, and no proof that the publications of petitioner in particular have any appreciable effect on the conduct of men, women or children. In these circumstances the Court should hold this statute to be unconstitutional on its face and as here applied as violating the freedom of the press guarantee of the First Amendment.

B.

The federal obscenity statute violates the due process clause of the Fifth Amendment.

The concept of obscenity is as protean as any we have. There is nothing constant about it except its changeability. It changes not only from group to group but also from person to person. It changes not only from nation to nation but also from city to city and from city to country. It changes not only from one decade to another but also from one hour to another and from court to court. As Fluegel commented in The Psychology of Clothes (International Psychoanalytic Library, No. 18, Ernest Jones, M.D., ed. p. 19): "Even within a given circle of intimates, what is considered quite permissible on one occasion may, a few hours later, be regarded as veritably indecent." What was considered obscene ten years ago is not so today

and what is considered obscene today will not be ten years hence. The obscenity statute in the instant case, as Judge Frank pointed out in his concurring opinion, is thus "exquisitely vague". Appendix 2293. The word obscenity as Circuit Judge Frank stated in the appendix to his concurring opinion is one of "exquisite vagueness". Appendix 2340.

Accordingly, at the last Term the Court held that the word "obscene" was not a sufficiently definite one, at least upon which to base a system of prior restraint. *Holmby Products* v. *Vaughan*, 350 U. S. 870 (1955), reversing 177 Kan. 728, 282 P. 2d 412. That case involved the motion picture *The Moon Is Blue*. A Kansas statute set up a board of review for films, and provided that this board should disapprove of such films as were "cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals". The board of review saw the film twice. The first time it disapproved with this notation: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme". Thereafter the plaintiff sought injunctive relief and the board placed its decision squarely on the word "obscene", saying: "* * * The Board has found that film to be obscene, indecent and immoral, and such as tends to debase or corrupt morals * * *".

The Supreme Court of Kansas in sustaining the board of review quoted the dicta from *Near* v. *Minnesota*, 283 U. S. 697, 716, (1931); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); and *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, 505, 506 (1952) to the effect that there might be a First Amendment exception for that which was obscene. Nevertheless, this Court reversed in a *per curiam* decision.

The statute which the Court struck down in *Holmby* was a civil as distinguished from a criminal one. But if the word "obscene" is not a sufficiently definite one in a civil statute, even though what is involved is a question of prior restraint, then it is clearly not a sufficiently defi-

nite one upon which to base a criminal statute. As the Supreme Court pointed out many years ago through Chief Justice Waite in *United States* v. *Reese*, 92 U. S. 214, 220 (1876): "Every man should be able to know with certainty when he is committing a crime."

Many times under the due process clause this Court has invalidated statutes which did not provide reasonably ascertainable standards of guilt. Two recent examples are *Winters* v. *New York*, 333 U. S. 507 (1948), and *Musser* v. *Utah*, 333 U. S. 95 (1948).

In the *Winters* case this Court held invalid a penal law of the State of New York which prohibited publications that massed in their pages stories of bloodshed and lust, saying:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' Pierce v. United States, 314 U. S. 306, 311; Cantwell v. State of Connecticut, 310 U. S. 296. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment" (333 U. S., at 515).

In the *Musser* case the defendants preached polygamy and were convicted under a state statute which made it an offense to conspire to commit any action "injurious to public morals." There was a conviction which the Supreme Court of Utah affirmed, but this Court vacated the judgment and sent the case back for further proceedings not inconsistent with the Court's opinion. The Court, speaking through Justice JACKSON, said:

> "• • • Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, United States v. Cohen Grocery Co., 255 U. S. 81 • • •" (333 U. S., at 97).

See also *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Herndon* v. *Lowry*, 301 U. S. 242; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Krauss & Bros.* v. *United States*, 327 U. S. 614; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Smith* v. *Cahoon*, 283 U. S. 553; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *Collins* v. *Kentucky*, 234 U. S. 216.

We submit that Circuit Judge Frank was right in his concurring opinion when he stated that the federal obscenity statute did not have "a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, *e.g.*, *International Harvester* v. *Kentucky*, 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.*, 244 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 885; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *Champlin Refining Co.* v. *Commission*, 286 U. S. 120; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *N. Y.*, 333 U. S. 507; *cf. U. S.* v. *Cardiff*, 343 U. S. 169." Appendix 2346.

Reference may further be made to additional movie censorship cases where the Court struck down statutes on the ground that the language in them was not sufficiently definite. *Superior Films Inc.* v. *Ohio*, 346 U. S. 587 (1954) (Ohio statute involving the use of the words "immoral, educational, or amusing and harmless character"); *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954) (New York Statute using the word "immoral"); *Gelling* v. *Texas*, 343 U. S. 960 (1952) (Texas statute using the words "sexually immoral"); *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495 (1952) (New York statute using the word "sacrilegious").

Under the decided cases of this Court the words "obscene" (*Holmby Productions*), "immoral" (*Commercial Pictures*), "moral" (*Superior Films*), "sexually immoral" (*Gelling*), "sacrilegious" (*Burstyn*), "massed stories of bloodshed and lust" (*Winters*), "injurious to public morals" (*Musser*), are none of them sufficiently definite. Obscenity is capable of definition only by exhausting the list

of equally undefinable synonyms. "All courts agree that the definition of obscenity is limited to the exhaustion of its synonyms; the disagreement arises in the arrangement of them." Grant and Angoff, *Massachusetts and Censorship*, 10 Boston U. L. Rev. 36, 155.

If obscenity is a term soft in the center, fuzzy at the edges, and elastic throughout when the subject of local law, it is confusion hopelessly confounded when the subject of federal law. At least in a local law the term has reference to some community standards of decency and morality. Such definition may have some discernible signification in a relatively homogeneous community such as a town, county, city or even some states. But it is wholly impossible of intelligible or objective construction when the community is the Nation. What is obscene in Greenwich, Connecticut may not be obscene in Greenwich Village, New York; nudity means one thing to a naked boy on a sharecrop farm and another to a choir boy; a picture of a woman with her breasts exposed causes one reaction to the Florida resident who every day sees women exposed in the sun for tanning and another to a prim Bostonian. Perhaps some extreme polar connotations of the word "obscene" may be found which will cover every community; but every word—including admittedly vague words, such as "good" or "bad"—has such semantic qualities. For purposes of the Fifth Amendment the word "obscene" in 18 U. S. C. §1461, as applied, is fatally vague because the penumbra between what is "obscene" and "not obscene" everywhere in the United States is as vast as the Nation itself; such vagueness means that 18 U. S. C. §1461 contains no objective standards.

Nor is it any answer to this argument to say that a jury in each case decides what is obscene. A person still does not know in advance whether he is committing a crime. As Circuit Judge Frank pointed out in the appendix to his concurring opinion in the court below:

> "Each jury verdict in an obscenity case has been sagaciously called 'really a small bit of legislation ad hoc.' [U. S. v. Levine, 83 F. 2d 156, 157]. So each

> jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?" (App. at 2332).

Not only must statutes, particularly those with criminal sanctions, provide reasonably ascertainable standards of guilt in order to meet the requirements of due process, but, further, if such statutes involve First Amendment rights the standards which they prescribe must be particularly clear and precise. As Circuit Judge Frank pointed out in the appendix to his concurring opinion:

> "Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See Stromberg v. California, 283 U. S. 359; Herndon v. Lowry, 301 U. S. 242; Winters v. New York, 333 U. S. 507; Kunz v. New York, 340 U. S. 290; Burstyn Inc. v. Wilson, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218" (App. 2341).

For additional authorities to the same effect see *Musser v. Utah*, 333 U. S. 95 (1948); *United States* v. *C.I.O.*, 335 U. S. 106, 150, 152; Note, 62 Harv. L. Rev. 77.

Since the federal obscenity statute does not provide a reasonably ascertainable standard of guilt, the Court should hold it invalid as violating the due process clause of the Fifth Amendment. Particularly should the Court reach this result because of two additional considerations: this statute involves criminal sanctions; and it applies to an area also under the protection of the First Amendment guarantee of freedom of the press.

III.

The federal obscenity statute is unconstitutional because it trespasses on the reserved powers of the States and of the people in violation of the First, Ninth and Tenth Amendments.

We believe that the absoluteness of the language of the First Amendment is no mere hyperbole. But the full import of that absoluteness emerges only when the First Amendment is considered in conjunction with the Ninth and Tenth Amendments. For while the First Amendment is not read as an absolute when Congress restricts speech incidental to the exercise of an enumerated federal power [*American Communications Association* v. *Douds*, 339 U. S. 382 (1950)], different considerations obtain when the Congress restricts expression unrelated to an expressly delegated federal power and affecting matters cognizable by the states [*Gitlow* v. *New York*, 268 U. S. 652, 672 (1925); *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294 (1952)]. When the Congress undertakes, as it did by the federal obscenity statute, to punish expression as a breach of the peace or offensive to morality or decency, it lays claim to jurisdiction over matter the Constitution intended to reserve to the states and the people thereof—a reservation historically implemented by absolutely barring the federal government from an area in which that government was without delegated power.

The body of the Constitution as originally adopted had no reference to the freedoms of speech or press. In the convention of 1787 the delegates considered the advisability of incorporating a provision on the subject but decided to omit it as unnecessary:

> "Friday, September 14, Mr. Pinckney and Mr. Gerry moved to insert a declaration 'that the liberty of the press be inviolably preserved.'
>
> "Mr. Sherman: 'It is unnecessary. The power of Congress does not extend to the press.'

"On this motion it passed in the negative." Elliott's Debates 545 (1901).

Such diverse persons as Thomas Jefferson and Alexander Hamilton, who scarcely agreed on anything, did agree on this: that no power over the press or speech had been delegated to the federal government. Hamilton in arguing against the Bill of Rights said: "For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" The Federalist 631 (Hamilton ed. 1864).

Jefferson responded:

> "Very well, I agree with you that the power is not legitimately here and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as a common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it not among such powers, we ask for a declaratory amendment to the Constitution which shall put it beyond peradventure that it is not one of the powers granted to the National Government." As quoted in Hart, *Power of Government over Speech and Press*, 29 Yale L. J. 410, 412 (1920).

See also,

> Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 714 (1938).

In order to remove all possibility of doubt that Congress had no power over the press, not even an implied one, the First Amendment declared:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

the Ninth Amendment provided:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

and the Tenth Amendment added:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The federal government was one of enumerated powers. This did not include any power over freedom of speech or of the press. That which the First Amendment absolutely barred to the federal government, the Ninth and Tenth Amendments reserved to the States and the people—the bar and reservation necessarily co-existing and complementing each other. Thus it was that "fighting words", libel, defamation, etc., were matter for state, not federal action from the beginning. Cf. *Beauharnais* v. *Illinois*, *supra*, at 290.

Mr. Justice Frankfurter, in his opening address at the conference on "Government Under Law" held on September 22, 23, and 24, 1955 under the auspices of the Harvard Law School, commemorating the two-hundredth anniversary of the birth of Chief Justice Marshall, pointed out:

> "Thus, the gravamen of the attack in the Virginia and Kentucky Resolutions against the Alien and Sedition Acts of 1798 was that they infringed on the rights of the states and were promotive of 'a general consolidated government.' It deserves to

be recalled that even Jefferson attributed to the states the power which he denied to the federal government. 'Nor does the opinion of the unconstitutionality and consequent nullity of the law—the [Sedition Act],' he wrote to Abigail Adams, 'remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. * * * While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right to do so.' (I am indebted for the exact text of this letter, dated September 11, 1804, to the kindness of Professor Julian P. Boyd, in one of whose forthcoming volumes of 'The Papers of Thomas Jefferson' it will duly appear in its entirety.)" [*John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 225-226 (1955)].

Similarly, an expert in the history of the American Revolution observed that Jefferson's fellow Republicans in Congress, while opposing the Federalists' Sedition Act, "were not willing to leave the press entirely free; [they] * * * regarded the punishment of libels and seditious speech and writings as a province of the states rather than of the Federal government. Nathaniel Macon declared that 'the liberty of the press was sacred'—but he meant only as against the Federal government, not against the states. Indeed, as he added, 'the states have complete power on the subject'." Miller, *Crisis in Freedom*, 168-169.

The dissents of Justices Holmes and Brandeis in *Gitlow v. New York*, 268 U. S. 652 (1925), carefully distinguished between federal and local power over freedom of expression. Mr. Justice Holmes there indicated that the word "liberty" as used in the Fourteenth Amendment perhaps "may be accepted with a somewhat larger latitude of in-

terpretation than is allowed to Congress by the sweeping language that governs, or ought to govern the laws of the United States" (268 U. S., at 672). This concept was expanded in *Palko* v. *Connecticut*, 302 U. S. 319 (1937), and became the basis for the Court's decision in that case. Later, Justice Jackson perceptively wrote in *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294, 295 (1952):

> "As a limitation upon power to punish written or spoken words, Fourteenth Amendment 'liberty' in its context of state powers and functions have meant and should mean something quite different from 'freedom' in its context of federal powers and functions.
>
> * * * * *
>
> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms.
>
> * * * * *
>
> "When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.
>
> "For these reasons I should not, unless clearly required, confirm to the Federal Government such latitudes as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power." (Dissenting opinion.)

We think that punishment of expression as obscene for offending decency, morality, or the peace falls within the category of those subjects intended to be reserved to

the States or the people and absolutely barred to the federal competence. The offense of obscenity, if any, is against the community and its standards, and it is the community which must find the wrong to have been committed; it is for this reason that the issue of obscenity is one of fact for the jury, the voice of the community. Grant & Angoff, "*Massachusetts and Censorship*", 10 Boston U. L. Rev. 36, 147.

It is precisely the predominant influence of the local community in the definition and determination of the offense of obscenity which places that offense outside the scope of federal power. What is the *national* community to which one is to look to define obscenity for *federal* purposes? There is none.

> "The insuperable obstacle is the size and diversity of our Federalism * * * a single federal law against obscene publications which is supposed to impose the same standards upon all the states controls the reading of New York and San Francisco, New Orleans and Boston. * * * Neither our racial nor religious alignments augur well for a federal control of the obscene * * *.
>
> "Apart from such racial and religious differences in fact, there is no uniform sense of the obscene. The federal postmasters have not even such slender moral clues for their guidance as state officials have in the enacted laws relating to the general protection of the public morals" (Ernst & Seagle, op. cit. *supra*, 70-72).
>
> "* * * there is no consistency in the decisions with respect to the same type of material from one period to another, or from one locale to another" Report of the Select Committee on Current Pornographic Material, 82nd Congress 34 (1952)].

The fallacy in hypothesizing some national community homogeneous as to matters of decency and morality—which is the indispensable prerequisite for federal obscen-

ity legislation—is no mere philosophical or abstract constitutional objection. In a very real and substantial way it impairs freedoms which must be left to the states. For when the federal government prosecutes and punishes the mailing of a publication, the effect is to ban the mailing thereof in every state; *even those states and communities which would not deem the mail indecent or immoral or obscene.* Differences in the application of substantially identical standards by New York and Boston have been fully documented. Grant & Angoff, *op. cit. supra*, 164-172, 151-2; Alpert, "*Judicial Censorship of Obscene Literature*", 52 Harv. L. Rev. 40, 53 ff. In addition, the different states have vastly differing legislative and judicial provisions concerning divorce, adultery, and fornication (Ernst & Seagle, *To The Pure*, 72)—important constituents in defining the morality of a community. Accordingly, unless the federal government undertakes to measure the mails by the standards of the most liberal community—a charge to which it will surely demur—the federal power over obscenity involves foreclosing to some communities mail and literature they would not consider objectionable. Plainly, then, the absence of any national community, and the bewildering varieties of local communities, preclude the existence of any federal power over matters of obscenity, and confine that power to the states and to the people.

That power which the Ninth and Tenth Amendments vest in the States and the people and the First Amendment expressly takes from the Congress is not to be subsumed from the postal power contained in Art. I, §8, cl. 7 of the Constitution. Under that postal power, Congress may act to protect the physical integrity of the mail or of the instrumentalities for their transmission. See *e.g.* 18 U. S. C. §§1691-1733, 62 Stat. 776-785). But Congress may not act to supervise the written content of that which passes through the mail. The job of the post office department is that of carrying the mail not of censoring it. As Judge Arnold so aptly put it in the concluding paragraph of his opinion in *Esquire* v. *Walker*, 151 F. 2d 49, 55 (1945),

affirmed sub nom. Hannegan v. *Esquire*, 327 U. S. 146 (1946):

> "We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds'."

The first proposal to restrict the use of the mails by printed matter because of its content came in 1835. In December of that year President Jackson proposed the passage of a law which would prohibit the use of the mails "of incendiary publications intended to instigate the slaves to rebellion". Cong. Globe, 24th Cong., 1st Sess., 10 (1835). Northern anti-slavery agitation had become violent and the dissemination of abolitionist literature from the north throughout the south had assumed dangerous proportions. Nevertheless the proposal was defeated, 25-19. It was defeated because the Senators, from the South as well as from the North, regarded legislation barring abolitionist literature from the mails as a violation of the freedom of the press guarantee of the First Amendment. The men who voted against President Jackson's proposal were men who understood the original meaning and purpose of the Bill of Rights. They were men who were already past their early childhood when the first ten amendments were adopted.

Because of the grave constitutional questions involved in President Jackson's proposal the Senate referred the measure to a select committee headed by Senator John C. Calhoun from South Carolina, bitter foe of abolitionist activities and intensely zealous for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering. Yet he took his place with his Northern colleagues to denounce the measure as violative of the freedom of the press guarantee of the First Amendment.

On February 4, 1836, the select committee chaired by Senator Calhoun reported:

> "The committee fully concur with the President * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it.
>
> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law * * *.
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads * * *. The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee refer to the amended article of the constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President * * *" S. Rep. 118, 24th Cong. 1st Sess. 1-3 (1836).

Senator Henry Clay, also from the South, as well as Senators John Davis and Daniel Webster, from New England joined in opposing President Jackson's proposal. They were sympathetic to the purposes of the measure, but they could not see their way clear to voting for it because of the prohibition of the First Amendment.

Senator Davis reminded his colleagues:

> "The liberty of the press was not like the other reserved rights, reserved by implication, but was reserved in express terms; it could not be touched in any manner."

In other words, power over the press was given neither expressly nor by implication to the federal government. On the other hand the denial of such power did not rest on any implication. That denial was in express terms: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Senator Davis had this further comment, which is even more pertinent today than when it was uttered:

> "The public morals were said to be in danger; it was necessary to prevent licentiousness, tumult, and sedition; and the public good required that the licentiousness should be restrained. All these were the plausible pretences under which the freedom of the press had been violated in all ages * * *."

Senator Clay "considered this bill unconstitutional" and as containing "A principle of a most dangerous and alarming character * * *. He had reached the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever * * *. The bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief * * *."

Finally Daniel Webster, whose influence on the early development of our constitutional principles was second only to that of Chief Justice Marshall, vehemently attacked the bill. He was "shocked" at the unconstitutional character of the whole proceeding. He declared that the freedom of the press included "the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?" Further: "Against the objects of this bill he had not a word to say; but with constitutional lawyers there was a great difference between the object and the means to carry it into effect * * * Congress had not the power, drawn from the character of the paper, to decide whether it should be carried in the mail or not; for such decision would be a direct

abridgment of the freedom of the press." See Cong. Globe 24th Cong. 1st Sess. pp. 36, 150, 164-165, 347-348, 351-354, 539.

This Court in an opinion by Justice Field reviewed these debates. *Ex parte Jackson*, 96 U. S. 727 (1878). Justice Field stated:

> "* * * In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation." At pp. 733-734.

For other accounts of this important incident in our history see 6 McMaster, *History of the People of the United States*, 288-291 (1883); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. Law Review 703, 717-723 (1938); Schroeder, *"Obscene" Literature and Constitutional Law*, 139-140 (1911).

In *Ex Parte Jackson*, *supra*, this Court further stated that the Fourth Amendment applied to the mails so as to protect sealed communications from unlawful searches and seizures. Justice Field writing for the Court said:

> "* * * No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." At p. 733.

This has remained the unquestioned law. But it is impossible to reconcile this principle with the premise that the postal power is plenary. If the exercise of the postal power is subject to the restraint of the Fourth Amendment it must be equally subject to the restraints of the First, Ninth and Tenth Amendments. No distinction is possible.

The origins of the innocuous postal clause (see Rogers, *Postal Power of Congress*, p. 23; Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 Minn. L. R. 402), as well as those of the First, Ninth and Tenth Amendments confirm that if there are to be obscenity statutes, even with respect to the mails, they must be on a state and not a national level. "* * * the United States has no criminal jurisdiction over offenses against order and good manners * * *." Chafee, *Free Speech in the United States*, 150 (1941 ed.) "* * * the Federal government clearly has no control over individual morals * * *." Ernst and Seagle, *To the Pure*, 69-70 (1928). See also, Schroeder, *"Obscene" Literature and Constitutional Law*, 140-141 (1911).

We submit that an obscenity statute cannot meet the requirements of the due process clause of the Fourteenth Amendment; certainly on a federal level an obscenity statute should be held invalid not only because of the due process clause of the Fifth Amendment but also because of the prohibition of the First Amendment against any law abridging freedom of the press and the reservations of power to the states and to the people of the Ninth and Tenth Amendments.

IV.

Besides the reasons otherwise set forth in this application, there are special and important reasons for the granting of the writ of certiorari in this case, since there is great national concern over the question of the protection of the publisher, distributor, writer or individual under the First and Fifth Amendments to the Constitution involving the question as to whether or not these amendments do not protect against "obscenity" prosecutions and as applied under the circumstances of this case.

There is pending before this Court (*sub judice*) *Butler* v. *Michigan* case (a Detroit, Michigan case) and there is docketed before this Court the *Alberts* and *Kingsley* cases from California and New York showing the present *national interest* in relationship to the application of the First Amendment to the Constitution and other appropriate Constitutional protection against obscenity laws.

This application alone brings up the question of the prosecution of Section 1461 involving the Constitutionality of the federal obscenity statute and its application under the circumstances of this case to the defendant and other questions related to the prosecution of this case.

There has been docketed in the United States Supreme Court, the case of David S. Alberts, appellant, against State of California, in the October Term No. 61, which case is pending before this court.

There also has been docketed in the October Term 1955, No. 107, the case of Kingsley Books, Inc., Louis Finkelstein, doing business as Times Square Book Shop, and Martin Kleinberg, appellants, against Peter Campbell Brown, Corporation Counsel of the City of New York, Appellee.

In the *Alberts* case Jurisdictional Statement was filed on April 11, 1956.

Motion for leave to file brief *Amicus Curiae* was filed September 26, 1956, and on June 6, 1956, there was filed a brief in opposition to motion to dismiss or affirm.

Motion to dismiss appeal was filed on June 13, 1956, by New York City's Corporation Counsel.

In any event, these matters remain docketed in the United States Supreme Court and have not yet been acted upon but are awaiting the hearing and determination of the case of Alfred E. Butler, Appellant, against State of Michigan, Appellee, which was argued and heard before the Supreme Court some time in October 1956, but to-date there has been no determination.

The *Alberts* case raises the question whether a California Penal Statute proscribing obscene and indecent writings and books upon their face and as construed and applied to appellant, violates freedom of speech and press, and conflicts with the decision of *Holmby Productions* v. *Vaughan*, 330 U. S. 870, and additionally, within the area of freedom of speech and press, the statute and application thereof, denied appellant substantive and procedural due process of law.

The appellant (Alberts) claimed that the statutory standard proscribing "obscene and indecent" literature, violates the decision in *Holmby* v. *Vaughan*, and was unconstitutionally vague and unconfined, and a censorial proscription of ideas and speech, violating freedom of press and speech under the First and Fourteenth Amendments to the United States Constitution.

This was a *State criminal statute* that was involved.

The question presented in the *Kingsley Books Inc.* case involved the validity of a section of the law providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene.

The case of *Alfred E. Butler* v. *State of Michigan* has already been heard before this court and has occasioned considerable interest.

In that case, Section 343 of Michigan *Penal* Code provided the following:

> "Any person who shall * * * sell * * * any book * * * containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious * * * descriptions (tending to incite minors to violent or depraved or immoral acts) manifestly tending to the corruption of the morals of youth, * * * shall be guilty of a misdemeanor."

Sharp challenge has been made that this section is in violation of the First and Fourteenth Amendments to the United States Constitution; that it is against freedom of speech and press clause of the Constitution; that the word "obscene" is so indefinite and vague, etcetera.

The issues involved in the *Alberts, Kingsley and Butler* cases are matters much less serious to the appellants there than the issue presented here.

In the *Alberts and Butler* cases, the criminal statute was a misdemeanor. In the *Kingsley* case it involved the enforcement of a civil remedy. In the present case, defendant received a five-year sentence and a substantial fine.

V.

Title 18, U. S. C., Section 1461 is unconstitutional. The conviction thereunder should be reversed.

Section 1461 reads as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—* * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

> The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

The Court in its charge omitted the last paragraph. Error might be claimed merely in the fact that the omission to charge the crime in the language of the statute was in itself sufficient to cause reversal. A graver question arises, however, for if one reads the statute and inserts the words, the statute would read "every obscene, lewd, lascivious, indecent, including matter of a character tending to incite arson, murder, or assassination, filthy or vile article, etc." It is obvious that when the statute is read as a whole, sense is lost and the charging words become so vague and indefinite as to render the statute unconstitutional. In *United States* v. *Alpers*, 338 U. S. 680, 682, the Court in an opinion per Mr. Justice Minton said:

> "We are aware that this is a criminal statute and must be strictly construed. This means that no offense may be created except by the words of Congress used in their usual and ordinary sense."

In dictionary usage "indecency" is a synonym for "obscenity". (See Funk & Wagnalls New College Standard Dictionary; Webster's New World Dictionary; The American College Dictionary.) The statutory definition of the word "indecent" is irreconcilable with usual and ordinary definitions of the word "indecency". No person could possibly conceive that the word "indecent" in the statute includes arson, murder, or assassination. The notion that a jury charged to consider a matter involving indecency would think that the term meant what the statute says it means, outrages sense. It may well be that instinctively the Court was outraged and, therefore, did not charge, in the language of the statute. We have hereinabove referred to numerous authorities on the requirements of certainty in definition of crime. This particular aspect of the case falls squarely within the condemnation in the opinion of *Winters* v. *New York*.

In that case the statute covered "any obscene, lewd, lascivious, filthy, indecent or disgusting book * * *." N. Y. Penal Law §1141(1). Paragraph 2 was added, which made it a crime to publish material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."

It was contended that paragraph 2 was unconstitutional and the Supreme Court accepted an interpretation by the Court of Appeals that the statute forbade the massing of stories of bloodshed and lust in such a way as to incite to crime against the person. The Court said per Mr. Justice Reed:

> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court" (*Winters* v. *New York*, *supra*, at p. 518).

Here the Legislature might have enacted a specific crime of inciting to arson, or assassination by means specified. What Congress chose to do was to misdefine and destroy the word "indecent". They thus both destroyed the historic use of the word "indecent" in the collocation and at the same time, therefore, destroyed the certainty which that grouping of words had theretofore enjoyed. It created such a situation that the trial court did not even charge in accordance with the statute. The statute in its present form is void and conviction of the defendant here should be reversed.

Where a statute contains language in part which would render the statute unconstitutional, a conviction under a general verdict of a jury is not to be sustained. As was said in *Terminiello* v. *Chicago*, 337 U. S. 1, 5:

"Since the verdict was a general one and did not specify the ground upon which it rested, it could not be sustained. For one part of the statute was unconstitutional and it could not be determined that the defendant was not convicted under that part.

The principle of that case controls this one. As we have said, the gloss which Illinois placed on the ordinance gives it a meaning and application which are conclusive on us. We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.

The statute as construed in the charge to the jury was passed on by the Illinois courts and sustained by them over the objection that as so read it violated the Fourteenth Amendment. The fact that the parties did not dispute its construction makes the adjudication no less ripe for our review, as the Stromberg decision indicates. We can only take the statute as the state courts read it. From our point of view it is immaterial whether the state law question as to its meaning was controverted or accepted. The pinch of the statute is in its application. It is that question which the petitioner has brought here. To say therefore that the question on this phase of the case is whether the trial judge gave a wrong charge is wholly to misconceive the issue."

Unless a jury charged to make a general verdict has before it a statute which read in its entirety is constitutional, it cannot render a proper verdict. This is particularly so in the light of the court's opinion in *United States* v. *Levine*, 83 F. 2d 156, 157:

"Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor

premise, but really a small bit of legislation ad hoc, like the standard of care."

The bit of legislation required to be made by the jury could only follow an instruction under constitutional legislation in its entirety.

VI.

The admission into evidence of the testimony of Postal Inspector Nelson and Postmaster Johnston, and the introduction of exhibits during their testimony including Exhibits 7, 8, 9, 10 and 11, and the peremptory denial of the defendant's motion for their suppression, constituted a violation of defendant's rights under the Fourth and Fifth Amendments of the United States Constitution.

On the Government's direct case, Nelson, a postal inspector, testified he sent a letter to the Postmaster at Cordele, Georgia, on February 24, 1953, with instructions to the Postmaster that he should purchase a money order for $15.25; that the payee should be Golden Hind Books, New York, N. Y.; that the remitter should be Archie Lovejoy, and that this money order should be enclosed in an attached letter addressed to Golden Hind Books at 110 Lafayette Street, New York 13, N. Y., and that the envelope should be sealed and the letter deposited in the mails.

A money order receipt was to be returned to Nelson by Postmaster Johnston with return of this communication below, showing that this was deposited in the mails at the post office at Cordele, Georgia.

Wiley H. Johnston, the Postmaster at Cordele, Georgia, also testified.

The name, Archie Lovejoy, was that of a fictitious person. Johnston signed that false name. The mail was to be received at R.R. No. 5 in Cordele, Georgia.

It is conceded by the Government, and must be conceded on this record, that this was a scheme and plan which was initiated, instigated and provoked by inspector Nelson

against the defendant, and that it was done by trickery, device and forgery.

The mail was afterwards opened and examined and introduced in evidence.

The motion for the suppression of this evidence and the barring of any of the exhibits in connection with this matter, was properly and timely made by defendant's counsel when the witness, Nelson was on the stand, and also when the witness, Johnston, was on the stand, on the ground that the admission of this testimony and the introduction of the exhibits was barred and should be suppressed as an unconstitutional search and seizure, and as contrary to the Fourth and Fifth Amendments of the Constitution of the United States.

This affected the introduction into evidence of exhibits 7, 8, 9, 10 and 11 during the testimony of these witnesses on January 4, 1956 (S. M. pp.) which testimony was against the defendant under counts 17 and 24, upon which he was convicted.

The record shows on its face that there was no probable cause for the search or seizure without a warrant; there was no warrant issued for opening or using the defendant's mail; there was plenty of time for the issuance of a warrant.

That there was no probable cause is clearly shown in the following way:

A mere perusal of the addendum consisting of the Government's exhibits in the *Roth* case which gives the exhibit number, the description of the exhibit, the dates of the mailing, the indictment count number, the witnesses name and the date that the exhibits were marked for identification and in evidence, will show that it was exhibit 7, form 668, that was sent on February 24, 1953, by Nelson, to Cordele, Georgia. That the money order on its face shows it was sent on February 26, 1953, to Golden Hind Books by Postmaster Johnston.

The dates alleged in the indictment in the first count was a circular addressed to James Feldhouse and *dated February 15, 1955.*

The second count, a circular, addressed to Bill B. Klovski, *dated 2/18/55.*

The third count, circular addressed to Brooks Dyer was *dated 1/5/56.*

The fourth count, circular addressed to Mr. R. L. Bissler was dated 2//16/55.

The fifth count, circular addressed to Brooks Dyer was dated 5/25/55.

The sixth count, circular addressed to Uhlich Children's Home was dated 5/26/55.

The seventh count, circular addressed to Charles Berger was dated 6/28/55.

The eighth count, circular addressed to Mr. Richard G. Kahn was dated 4/28/55.

The ninth count addressed to N. W. Registry for Nurses was dated 5/24/55.

The tenth count addressed to Mr. Paul J. Masadowski was dated 12/10/54.

The eleventh count addressed to Duane Elliott was dated 1/3/55.

The twelfth count addressed to Gloria Jean Paulo was dated 12/24/54.

The thirteenth count addressed to Robert Mateinore was dated 11/9/54.

The fourteenth count addressed to Mr. J. Chapman was dated 4/18/55.

The fifteenth count addressed to Mrs. E. W. McCreery was dated 4/15/55.

The sixteenth count addressed to Mrs. Geo. K. Livermore was dated 7/20/53.

The eighteenth count carbon of letter signed Bernard Skriloff was dated 3/11/55.

The eighteenth count package addressed to Bernard Skriloff was dated 3/21/55.

The nineteenth count, package addressed to Bernard Skriloff was dated 3/18/55.

The twentieth count, carbon of letter signed George Blair was dated 4/6/55.

The twentieth count, form 688 sent by Daly to Dover, N. J. was dated 4/7/55.

The twenty-first count, carton mailed to Kings News was dated 6/30/55.

The twenty-second count, carbon mailed to Bell Block News Co. was dated 6/10/55.

The twenty-third count, package addressed to F. C. Weatherdon, Jr. was dated 5/21/55.

The twenty-fifth count, package addressed to Whispering Pines Tret. was dated 12/29/54.

Overt Act 4—Carton was mailed to Kings News 5/9/55.

Overt Act 2—Packing slip was mailed 1/6/56.

This has been set forth in extenso, to show that the record is barren of any probative evidence in this case or in this record that the postal inspector Nelson had any evidence of probable cause to believe that Roth was guilty of violating the postal laws.

It must further be kept in mind that the conspiracy count was *dismissed* (see dates involved); that all other counts except 10, 13, 17 and 24 upon which the jury convicted Roth, had been dismissed by the court or resulted in the jury's exoneration of not guilty; that this left count 10 (Madadowski) and count 13 (Mateinore) which circulars or material were sent out posterior in time November 9, 1954 and December 10, 1954, and that the letter or material referred to in count 17 was allegedly sent on February 19, 1954, and count 24 on *March 10, 1953.*

Thus there is nothing in this record whatsoever from beginning to end upon which the postal inspector or the Government can claim any *probable cause* as to violation of the postal laws by the defendant Roth; there was no *warrant* justifying the Government's action; there was no evidence or foundation laid for the Government's conduct; the application for relief under the Fourth and Fifth Amendments was timely and properly made; no bill of particulars had been granted to defendant; the indictment failed to set forth and give notice to the defendant the obscene matter referred to therein; and the defendant was

peremptorily shut off in his application and denied his rights under the Fourth and Fifth Amendments of the United States Constitution and was denied *hearing* or *relief* by the *summary* and *peremptory* denial of the Judge.

In *Ex-Parte Jackson*, 96 U. S. 727, 729, 733, the Supreme Court said, through Mr. Justice Field:

> "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the People, of far greater importance than the transportation of the mail.
>
> * * * * * *
>
> The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

One of the safeguards around the right of search and seizure is the previous existence of probable cause. In the instant case this was supplied neither by the Government witnesses who obtained the evidence, nor by their knowledge of previous evidence of probable cause in the hands of others, for their testimony is silent as to this, and an examination of the indictment shows that the material in the hands of those other witnesses called by the Government

was obtained *subsequent* to the material obtained by entrapment.

There can be no presumption of guilt. On the contrary, there is a presumption of innocence. Unless the Government were able to establish guilt neither the Government nor the court below could assume guilt, or even the appearance of guilt, at the time of the entrapment. Even though on the trial there might be an appearance of guilt from the testimony of others, that would not sanction the use of evidence obtained by entrapment in the absence of guilt, or the appearance of guilt at the time and previous to the entrapment. Under those conditions there could be no probable cause and the record shows none. The introduction into evidence of the material obtained by these Post Office officials was plainly illegal.

In *Weathers* v. *United States*, 126 F. 2d 118, 119, the Court said:

> "It is well settled that when a person is reliably reported to be violating a law, or when the circumstances show it is likely, he may by an officer be tested by an opportunity, a decoy." (Emphasis added.)

The law is established in *Heath* v. *United States*, 169 F. 2d 1007, 1010:

> "It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused."

In the absence of such foundation the motion to suppress the evidence should have been granted.

(A)

The evidence obtained by Post Office officials was illegally obtained by forgery and by trickery and device, and was opened and examined and introduced into evidence without warrant.

The testimony of the Post Office officials shows that they established Post Office boxes under false names; that they mailed such money orders to the defendant in order to induce the defendant to send to them material which they might later claim to be illegal for transmission through the mails. We have previously assumed that had the Department done this with knowledge of the commission of a crime, or of the intent to commit a crime, then there would have been probable cause for obtaining evidence. But such evidence could have been obtained forthrightly and with due regard to the sanctity of the mails. Even the Post Office officials and the District Attorney conceded on this trial that sealed mail is inviolate. But they chose rather to adopt trickery in order to decoy the defendant. Such trickery and fraud is not within the protection of the law, which allows entrapment lawfully done. The Post Office might well have received complaints from individuals. It might have received even from some of the witnesses in this case material which was claimed to violate the law in its transmission, but such evidence was not the basis for the entrapment, and could not have been. The only method of entrapment here and of obtaining this evidence without probable cause was by the trickery and device of the Post Office officials utilizing forgery and aliases. As was said in *Ex-Parte Jackson*, *supra*, at page 735:

> "Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced

upon competent evidence of their violation obtained in other ways; * * *."

The grievance in this case is that it was evidence obtained by opening mail without warrant, which evidence was obtained by trickery and device, and is contrary to law.

In *Sorrells* v. *United States*, 287 U. S. 435, which is cited with approval by the court in the *Weathers* case, *supra*, the Court, at page 445, quoted:

> "When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor."

And again, at page 448, the Court stated:

> "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."

The concurring opinion of Mr. Justice Roberts in the *Sorrells* case (*supra*, at p. 454) defined entrapment as:

> "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."

The concurring opinion, at page 457, stated:

> "The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple

belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."

Under the circumstances in this case, because there was no probable cause, because the testimony was obtained by trick and device, and because the evidence when obtained was opened without order or warrant therefor, the motion to suppress (made at S. M. P. 290-293) should have been granted under the provisions of both the Fourth Amendment as to evidence obtained by seizures and search without probable cause and under the Fifth Amendment as constituting a denial of due process.

VII

Of the twenty-four counts in the indictment, the petitioner was found guilty of only four counts.

A multifarious indictment and the prejudicial testimony and exhibits under the other twenty-two counts in the light of the charge of the judge and the summation of the District Attorney require a reversal because the petitioner was denied a fair trial and due process.

The indictment contained in all twenty-six counts. Three counts, Nos. 12, 25 and 26 were dismissed and the case was

submitted to the jury on twenty-three counts. The defendant was found guilty only on four counts, Nos. 10, 13, 17 and 24.

The Government called in all some twenty-three witnesses, of whom only four, including a postal inspector and postmaster were heard as to the four counts on which the defendant was found guilty. Nineteen of the Government's witnesses testified as to other matters but their testimony played an important part in the summation and consideration by the jury. In addition to the witnesses the Government put in evidence some 35 exhibits which were read in whole or in part to the jury and had in fact a cumulative effect upon the jury, although only seven of the exhibits referred to the grounds on which the defendant was found guilty.

VIII.

The Judge's charge as to the interrelationship of the counts of the indictment caused such confusion as to make the verdict of the jury erroneous and invalid. denied the defendant a fair trial and due process and denied him the clear charge that he was entitled to under the law.

The Judge's charge as to the interrelationship of the counts of the indictment caused such confusion as to make the verdict of the jury erroneous.

At S. M. P. 585, the Court charged:

> "It follows, of course, if you were to find the defendant not guilty on all of the first seventeen counts, you would have to find him not guilty on the remaining counts."

After the jury had retired, S. M. P. 591-2 discloses the following incident:

> "(The following took place at 6:07 p. m. in the robing room:)

The Court: I have another note from the jury, gentlemen. It says:

'We need a clarification of your charge, referring to counts 1 to 17 of the indictment as relating to the remainder of the counts.

'Specifically, did you say if the defendant is "Not Guilty" on the remainder, and why?' "

Then there follows a coloquy between counsel and the Court, S. M. P. 592, 593, 594, 595, 596, 597, which discloses that not only the jury but even counsel and the Court were incapable after a long discussion of reaching agreement on the significance and meaning of the Court's language. The Court, thereupon, undertook, S. M. P. 597, after counsel had left the robing room to frame a recharge and recalled counsel. Again a colloquy took place which covers two pages of the minutes and the jury were recalled. Thereupon, the Court had read to the jury the communication which he had received from them and had read to the jury the portion of the charge as indicated in chambers previously. He asked the jurors whether that helped them and further discussion took place at S. M. P. 600-601, following which the Court asked, "Does that answer your question? Does that clear it up?" The minutes show that the jury nodded assent. The Court thereupon said, "All right." A discussion then took place as to whether the jury should adjourn for dinner. Juror No. 5 asked that the jury to be given about three minutes before they went to dinner to make sure they had a meeting of the minds on what you had just told them. The Foreman asked, S. M. P. 602:

"The Foreman: Your Honor, would it be possible for the stenographer to transcribe that portion of the charge, have it right there?

The Court: I can't do that. I don't think I have any right to give you the charge. If it isn't clear to you, I will have him read it again.

The Foreman: I think we understand."

The entire proceedings occupied some 10 pages of the stenographer's minutes. It is evident that the question involved a finding of fact with regard to the advertising matter attributed to the defendant and the alleged non-mailable literature alleged to have been distributed by the defendant. It would appear that the Court was attempting in some way to impress upon the jury a relationship between the separate counts embodying advertising and literary matter and it is probable that the jury may have felt that it was essential for them to find some correspondence between counts 1 to 17 and counts 17 to 24 for it is significant that when they brought in their verdict they found the defendant guilty on 2 counts of the first group of 16 and 2 counts out of the group 17, *et seq., i.e.,* counts 10 and 13 out of the first group and 17 and 24 of the second group. *Strikingly enough count 10, count 1' and count 12 are identical except for the name of the addressee. The articles and things alleged to have been transmitted are identical. The testimony was in substantial agreement on all these counts. Yet, the jury found the defendant guilty only on count 10.* This could only have resulted from the confusion in their minds and a feeling from that portion of the charge of the Court under consideration here that there must be some corresponding relationship between counts in the first group and counts in the second group. Strangely enough count 17, on which the defendant was also found guilty, and count 24, on which the defendant was found guilty, relate to different matter. There was no correspondence between the alleged matter mailed nor uniformity with regard to the findings on the counts.

This confusion is understandable since it is obvious that counsel and the Court could not agree on the meaning of the charge. The last significant request of the foreman of the jury that that portion of the charge be given to them in writing sheds light. The jury gave formal assent to the Judge of their understanding but the foreman still could say that they wanted it in writing which must indicate to anyone trying to understand the process of adjudication that they needed more aid than they received.

The confusion here resulted from this attempt to include in one indictment too many counts. The attempt to create a multiplicity of crimes by combining in one indictment 26 counts inevitably leads to confusion. Certainly it did here. The jury's verdict resulting from the colloquies between counsel and the reframed charge of the Court indicate it. Such multifariousness in the indictment was bound to result in lack of due process. Process which is confused can never be due. Defendant was denied a fair trial.

IX.

Defendant was deprived of the fair trial contemplated by due process of law by virtue of the District Attorney's references to the witnesses and exhibits, which were improper, inflammatory and prejudicial.

The prosecution of the case was inflammatory and prejudicial; that from the very opening the District Attorney alluded to money,* though there was no evidence whatever in the case as to profit from the sale of any of the materials charged; this was the beginning note, it was also the concluding note of the summing up. In addition, the District Attorney's actual summing up is as a whole inquisitive and inflammatory, though it also contains many phrases which in themselves have been condemned—he apologizes for reading things which "would offend the sensibility of any decent person" (p. 559); he says he wants to "stop it" (p. 559); he calls upon the jury to help the United States Government enforce the law that has already been passed (p. 559); he points out that witnesses came at quite some inconvenience to themselves in order to stand up for what they thought was right (p. 560); he incites the jury to resent proper cross-examination of witnesses (p. 561); he suggests an invidious comparison between the

*"*To be realistic about it, there is money in this kind of dealing and you may be assured that there are a great many people who are watching this case with a lot of interest.*"

Govern ent's witnesses and those who are defending the case; he points out that the Government's witnesses "have done everything that they can do"; (p. 562) and suggests that they remind him (the District Attorney) of the jury, suggesting also that the jury "if this kind of thing had been pouring into your homes * * * would have been on the witness stand yourself"; he challenges the jury to do something by saying (563) "now those people have done everything they can do and they are interested in this case; they are interested to see what you are going to do now"; he reminds the jury of its strength to do what he is inciting it to do by saying "you are in a much stronger position than any one of those people, because you hold in your hands the power to make a final determination of this"; at p. 567 he reads a passage from a literary biography which was an exhibit and by it directly compares the defendant with the persons described in it, who are there called "jackals" (the defendant did not take the stand).

The Assistant District Attorney introduced in evidence a book entitled Aubrey Beardsley by Haldane McFall, Exh. 36, which was admitted without objection on January 9, 1956. This book was unfairly and improperly misused by the Assistant District Attorney.

In his inciting and inflammatory summation (P. 57 Government's appendix), the Assistant District Attorney told the jury:

> (567) "The Jackals who had egged him on to base ends and has sniggered at his obscenities, when his genius might have been soaring in the empyrean, could bring him scant comfort as he looked back upon the untidy patches of his wayfaring; nor were they likely ones to fulfill his agonized last wishes—indeed, almost before his poor wracked body was cold, they were about to exploit not only the things he desired to be undone but they were raking together for their own profit the earlier crude designs that they knew full well Beardsley had striven

his lifelong to keep from publication owing to their wretched mediocrity of craftsmanship."

In the re-cross examination by Assistant District Attorney (S. M. pp. 491-4 inclusive), will be seen how unfairly and deplorably he played up various aspects of this book.

No proof was ever introduced in evidence that the hearsay mentioned in this book was the *truth*. No other evidence was given in the case to show that *any of the facts* mentioned in this book about Beardsley were true.

The witness, Lorge, had never read the book. The defendant had not read the book. There was no evidence in the record at all to show that he ever knew this book existed or ever read any of its contents.

There was not the slightest evidence in the case that the defendant knew that Under The Hill was another title for Venus and Tannhauser.

The use made of this book by the prosecutor in his cross-examinations and in his summation were highly improper, inflammatory, incitative and incompetent, but helped foul the atmosphere so that the defendant never had his day in court.

In fact this court will notice that the defendant's counsel upon the conclusion of the District Attorney's summation said that it was incitative, but the court saw nothing improper in it.

Beginning with 567 and thereafter, the District Attorney talks of the work of the prosecution in the preparation of this case and (at 570) reaches a peak, calling once again attention to the fact "that there are many people who are watching this, because there is money in this", that people are going to be interested to see whether the jury was going to "make it legal or not" and winds up by saying "if you want me and these post office inspectors to continue to work and fight to stop this kind of thing, you can tell us that by bringing back a verdict as quickly as you possibly can, convicting him on every count in this

indictment, and we will do it. And if you don't care, or if you want to continue it, then acquit him, and I can assure you that the sewers will open."

For cases dealing with inflammatory summations see *N. Y. Central R.R. Co.* v. *Johnson*, 279 U. S. 310; *Berger* v. *United States*, 295 U. S. 78 and *Viereck* v. *United States*, 318 U. S. 236.

The above recital just covers the saliencies. The summing up as a whole was inflammatory. Immediately after its delivery, the defendant (p. 571 *et seq.*) objected to it and, charging that it was incitative, requested the Court to correct what had been done. The Court said (p. 572) "You may have your objection noted on the record. I see nothing improper in it. I will put it that way", and the defendant excepted.

It need not be pointed out that a jury is not brought into court to *help* the Government, but to sit *in judgment* as to whether or not the Government has made out a case beyond a reasonable doubt. (See District Attorney's remarks S. M. P. 559).

At (S. M. P. 570), the Assistant District Attorney said:

> "I told you in my opening statement that there are many people who are watching this, because there is money in this; this stuff will sell. They are going to be interested to see whether you are going to make it legal or not. Let me say this: if you want me and the post office inspectors to continue to work and fight to stop this kind of thing, you can tell us that by bringing back a verdict as quickly as you possibly can, convicting him on every count in this indictment, and we will do it. And if you don't care, or if you want to continue it, then acquit him, and I can assure you that the sewers will open."

This appeal to the jury to help the district attorney and the post office inspectors to continue to work falls within the condemnation of the language in *Berger* v. *United States*, 295 U. S. 78. The Court there said at page 88:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Is it part of a jury's function to encourage a district attorney? Are they not to sit as impartial arbitrators or is the jury an arm of the district attorney's office?

In the light of these remarks of the district attorney, it cannot be said that the defendant had a fair trial.

X.

The publication American Aphrodite when considered in its entirety was not obscene.

Today in judging a publication the courts will (1) look at the publication as a whole rather than at certain parts; (2) consider the effect of the book on the average reader,

rather than on the salacious few; (3) consider whether the work under review is dirt for dirt's sake, in other words, whether one can see in it the leer of the sensualist; and (4) consider whether the dirt for dirt's sake is the dominant feature of the work, so dominant that it outweighs all other merits that the work may have. *Brown v. Kingsley Books*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, affirming 208 Misc. 150, 142 N. Y. S. 2d 735; *Halsey v. New York Society for Suppression of Vice*, 234 N. Y. 1; *Walker v. Popenoe*, 149 F. 2d 511 (D. C. Cir.); *Parmelee v. United States*, 113 F. 2d 729 (D. C. Cir.); *United States v. Levine*, 83 F. 2d 156 (2d Cir.); *United States v. One Book Entitled Ulysses*, 5 F. Supp. 182 (D. S. D. N. Y.), affirmed 72 F. 2d 705 (2d Cir.). In *Brown v. Kingsley Books*, *supra*, the Court of Appeals concluded its opinion with this paragraph:

> "In reaching the conclusion which I do, I assume, of course, that the statutory prescription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work will be determined by viewing it 'broadly, as a whole', Halsey v. New York Soc. for Suppression of Vice, 234 N. Y. 1, 4-5, 136 N. E. 219, 220, with reference to 'its dominant effect'; 'not on any particular class, but upon all those whom it is likely to reach', United States v. Levine, 2 Cir., 83 F. 2d 156, 157; United States v. One Book Entitled Ulysses, supra, 72 F. 2d 705; 707-708, affirming, D. C., 5 F. Supp. 182; and that consideration will be given, among other factors to 'the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient'. United States v. One Book Entitled Ulysses, supra, 72 F. 2d 705, 708. The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the trial court's findings of fact. The same dan-

> ger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectually enforcing its policy against the circulation of the obscene, but in making certain that the courts apply standards that will insure the least possible risk of interference with unobjectionable publications."

Nothing objectionable is to be found in the text of the publications involved in this case.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. It is necessary to determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and we may not consider detached or separate portions in reaching a conclusion. It is necessary to judge the circulars, pictures and publications by present-day standards of the community; do they offend the common conscience of the community by present-day standards.

The book would have to have been read by the jury to determine whether it was obscene. This was not done or permitted.

XI

The Court in its charge incorrectly interpreted Title 18 U. S. C., Sec. 1461. It dissected and opposed the collocation of terms so as to render the statute vague and indefinite. (This Point is set forth in extenso in Point I of Appellant's Brief to the C. C. A., pages 7, *et seq.*).

The petitioner was deprived of his constitutional rights in a prosecution based upon a loose, vague and indefinite indictment, by a denial of a bill of particulars, by the looseness of the term 'obscenity' as applied in this case and as charged to the jury, and by the Assistant District Attor-

ney's use on recross-examination and in summation and otherwise against the defendant of the book "Audrey Beardsley," and by the unfairness of the prosecutor in making inflammatory and incitative and legally incompetent remarks and references to testimony and exhibits and thereby creating an atmosphere of unfairness to petitioner and by preventing petitioner from having a fair and impartial trial, by the failure of the Government to carry its burden of proof or to present any affirmative evidence of defendant's guilt, and by a confusing charge on the part of the Judge, which the jury did not and could not understand.

The Government had the burden of presenting affirmative proof of obscenity; that proof as to obscenity and the standards by which it can be recognized are available and presentable; indeed such proof was adduced by the defendant in this trial; that the Government's failure to adduce such proof placed upon the defendant the burden of proving his innocence.

That the statute indictment or charge under which the prosecution was brought and as construed and interpreted to the Jury both upon the trial and as charged by the Court was so vague and indefinite, that it consisted of question-begging words; that the statute and its interpretation did not have predictability, i.e., one could not tell from it what are the acts which it prohibits and against which it will invoke sanctions; that it is even more unpredictable when read with the cases; that the statute contains all of the vices pointed out with relation to a section of a similar New York State statute (old Sub. 2 of Sec. 1141 Penal Law of N. Y. discussed in the case of *Winters v. New York*, 332 U. S. 507).

That there was not shown in this trial any clear and present danger which might result from the distribution of the matter involved in these mailings; that in a case where an exception is being made to a constitutional guarantee, clear and present danger ought to be shown." See *Terminello* v. *Chicago*, 337 U. S. 1; *Commonwealth* v. *Gor-*

don, 66 Penn. Dist. & Co. Rep. 101 and *Walker* v. *Popenoe*, 142 Fed. 511.

That on all of the evidence, the government failed to make out a case. At the worst evaluation, there existed in law and fact a reasonable doubt in favor of the defendant and the government failed in its proof.

That from the nature of the verdict, it is clear that the jury did not consider the book charged in Count 24 (the other Counts on which the defendant was convicted deal with the mailing of circulars advertising this book) as a whole, and this despite repeated correct charges that they do so. See *U. S.* v. *One Book entitled Ulysses*, 72 F. 2d 705.

That this book, consisting of 200 pages, contained over and beyond the passages complained of in the trial, sections on literary history, poetry, short stories, and the entire book "Twilight of the Nymphs" by Pierre Louys; that the book, as a matter of law, was not obscene.

CONCLUSION

Since this case involves fundamental federal constitutional questions which should be settled by this Court, this petition for a writ of certiorari should be granted.

Respectfully submitted,

David von E. Albrecht,
David P. Siegel,
Attorneys for Petitioner.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 387—October Term, 1955.

(Argued June 6, 1956 Decided September 18, 1956.)

Docket No. 24030

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAMUEL ROTH,

Appellant.

Before:

CLARK, *Chief Judge,* and
FRANK and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, John M. Cashin, *Judge.*

Samuel Roth appeals from his conviction for mailing obscene matter in violation of 18 U. S. C. §1461. Affirmed.

GEORGE S. LEISURE, JR., Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for appellee.*

PHILIP WITTENBERG, New York City (Wittenberg, Garrington & Farnsworth and Irving Like, New York City, on the brief), *for appellant.*

CLARK, *Chief Judge*:

This is an appeal by Samuel Roth from his conviction for violation of 18 U. S. C. §1461. The indictment contained twenty-six counts charging the mailing of books, periodicals, and photographs (and circulars advertising some of them) alleged to be "obscene, lewd, lascivious, filthy and of an indecent character." Three counts were dismissed. After a trial the jury found defendant guilty on four counts, and not guilty on nineteen. The trial judge sentenced defendant to five years' imprisonment and to pay a fine of $5,000 on one count, while on each of the other three counts he gave a like term of imprisonment, to run concurrently, and a $1 fine remitted in each case. On this appeal, defendant claims error in the conduct of the trial, but once again attacks the constitutionality of the governing statute.

This statute, 18 U. S. C. §1461, originally passed as §148 of the act of June 8, 1872, 17 Stat. 302, revising, consolidating, and amending the statutes relating to the Post Office Department, and thence derived from Rev. Stat. §3893, herein declares unmailable "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character,"[1] and makes the knowing deposit for mailing of such unmailable matter subject to a fine of not more than $5,000 or imprisonment of not more than five years, or both. In *United States* v. *Rebhuhn*, 2 Cir., 109 F. 2d 512, 514, certiorari denied *Rebhuhn* v. *United States*, 310 U. S. 629, Judge Learned Hand, in dealing with a claim of unconstitutionality, pointed out that it had been overruled in *Rosen* v. *United States*, 161 U. S. 29, "and many indictments have since been found, and many persons tried and convicted. * * * If the question is to be reopened the Supreme Court must open it." Since

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1 As pointed out below, the quoted wording was somewhat expanded by Congress in 1955, after the commission of the offenses here involved.

that decision many more cases have acknowledged the constitutionality of the statute, so much so that we feel it is not the part of responsible judicial administration for an inferior court such as ours, whatever our personal opinions, to initiate a new and uncharted course of overturn of a statute thus long regarded of vital social importance and a public policy of wide general support. It is easy, in matters touching the arts, to condescend to the poor troubled enforcement officials; but so to do will not carry us measurably nearer a permanent and generally acceptable solution of a continuing social problem.

Against this background we are impressed by the decision this year of a great court in *Brown* v. *Kingsley Books, Inc.*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 641, 642, where, accepting general constitutionality of such legislation, the decision breaks new ground in upholding authorization of preventive relief by way of injunction at the suit of a public officer.[2] In his opinion, Judge Fuld summarizes the controlling law thus: "That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court [citing cases] and by the United States Supreme Court [citing cases]." Among cases from New York which he cites is *People* v. *Doubleday & Co.*, 297 N. Y. 687, 77 N. E. 2d 6, affirmed by an equally divided court, 335 U. S. 848,

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2 The injunction against sale of paper-covered booklets "indisputably pornographic, indisputably obscene and filthy"—the words are Judge Fuld's, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 640—was granted under a 1941 statute, N. Y. Code Cr. Proc. §22-a, on suit of the Corporation Counsel of the City of New York. While the court was unanimous in holding the statute constitutional and the injunction proper, there were two opinions—a detailed analysis of the legal background by Judge Fuld, concurred in by two other judges, and a brief and more formal statement by Judge Desmond, concurred in by two other judges.

while among the cases in the United States Supreme Court upon which he relies are *United States* v. *Alpers*, 338 U. S. 680; *Winters* v. *People of State of New York*, 333 U. S. 507, 510, 518, 520; and *United States* v. *Limehouse*, 285 U. S. 424. He goes on to say: "Imprecise though it be—its 'vague subject-matter' being largely 'left to the gradual development of general notions about what is decent' (per L. Hand, J., *United States* v. *Kennerley*, D. C., 209 F. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard." In the case last cited, Judge Hand asked, "* * * should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" and continued: "If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence." In quoting this with approval, the Ninth Circuit has recently said: "We think Judge Learned Hand was in the best of his famous form in his happy use of words." *Besig* v. *United States*, 9 Cir., 208 F. 2d 142, 147.

So this important social problem, which has come down to us from English law and which has led to statutes of a generally similar nature in almost all of the other jurisdictions in this country, see *Brown* v. *Kingsley Books, Inc.*, *supra*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639; Note, 22 U. of Chi. L. Rev. 216, has resulted in a general judicial unanimity in supporting such prosecutions. There is a considerable body of additional precedents beyond those cited above, both in the Supreme Court of the United States and in other federal jurisdictions, of which various examples are given in the footnote.[3] It will not do to distinguish these

3 See, e.g., *Ex parte Jackson*, 96 U. S. 727; *Swearingen* v. *United States*, 161 U. S. 446; *Dunlop* v. *United States*, 165 U. S. 486; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508; *Robertson* v. *Baldwin*, 165

cases as dicta or suggest that they have not considered modern problems. They are too many and too much of a piece to allow an intermediate court to make an inference of doubt in the circumstances. We can understand all the difficulties of censorship of great literature, and indeed the various foolish excesses involved in the banning of notable books, without feeling justified in casting doubt upon all criminal prosecutions, both state and federal, of commercialized obscenity. A serious problem does arise when real literature is censored; but in this case no such issues should arise, since the record shows only salable pornography. But even if we had more freedom to follow an impulse to strike down such legislation in the premises, we should need to pause because of our own lack of knowledge of the social bearing of this problem, or consequences of such an act;[4] and we are hardly justified in rejecting out of hand the strongly held views of those with competence in the premises as to the very direct connection of this traffic with the development of juvenile delinquency.[5] We conclude, therefore, that the attack on constitutionality of this statute must here fail.

U. S. 275, 281; *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Schindler* v. *United States*, 9 Cir., 221 F. 2d 743, certiorari denied 350 U. S. 938; *United States* v. *Hornick*, 3 Cir., 229 F. 2d 120, affirming D. C. E. D. Pa., 131 F. Supp. 603; *Roth* v. *Goldman*, 2 Cir., 172 F. 2d 788, certiorari denied 337 U. S. 938.

4 See Fuld, J., in *Brown* v. *Kingsley Books, Inc.*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 641, n. 3: "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, e.g., Jahoda and Staff Research Center for Human Relations, New York University [1954], The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)"

5 Sen. Rep. No. 113, 84th Cong., 1st Sess., supporting the 1955 amendment to §1461 discussed below, has this to say: "The subcommittee of

Defendant, however, takes special exception to the judge's treatment in his charge of the word "filthy," asserting that he opposed this term to the other parts of the statute, so as to render the statute vague and indefinite. What the judge said was this: " 'Filthy' as used here must also relate to sexual matters. It is distinguishable from the term 'obscene,' which tends to promote lust and impure thoughts. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." But this seems to us in line with long-standing judicial definitions of the term. The words "and every filthy" were inserted in the statute at the time of the enactment of the Penal Code in 1909. And in *United States* v. *Limehouse, supra,* 285 U. S. 424, 426, in 1932, Mr. Justice Brandeis for the Court pointed out the obvious intent to add "a new class of unmailable matter—the filthy." As he definitely pointed out, this plainly

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the Committee on the Judiciary investigating juvenile delinquency in the United States reports that the nationwide traffic in obscene matter is increasing year by year and that a large part of that traffic is being channeled into the hands of children. That subcommittee recommended implementation of the present statute so as to prevent the using of the mails in the trafficking of all obscene matter. The passage of S. 600 will contribute greatly in the continuing struggle to combat juvenile delinquency and the corruption of public morals." 2 U. S. Code Cong. & Adm. News 2211 (1955).

See also Chief Justice Vanderbilt, *Impasses in Justice,* [1956] Wash. U. L. Q. 267, 302: "(4) Our greatest concern with the oncoming generation, I submit, relates to the perversion of young minds through the mass media of the movies, television, radio, and the press, especially so-called comics. Wertham, Seduction of the Innocent (1954). See also Feder, Comic Book Regulation (Univ. of Calif. Bureau of Pub. Admin. 1955). The problem is only beginning to receive the consideration its seriousness calls for. Here is a field in which the law schools are well equipped to furnish leadership in a controversy where rare discrimination and courage are required."

Perhaps scholarly research may suggest better statutes than we have; but it is doubtful if help can be found in such suggestions as for the inclusion in legislation of the enticing invitation, "For Adults Only." *Cf.* Ernst & Seagle, To the Pure 277 (1928).

covered sexual matters; and the Court, so he said, had no occasion to consider whether filthy matter of a different character also fell within the prohibition. We do not see how this case can be read other than as support for the interpretation made by the court below and for the validity of the Act as interpreted. Moreover, earlier it had been ruled by the Sixth Circuit in *Tyomies Pub. Co.* v. *United States*, 6 Cir., 211 F. 385, 390, in 1914, that the trial judge properly submitted the issue to the jury as to whether or not a picture was filthy with the explanation: "By the term 'filthy' is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing." This is in substance what Judge Cashin charged here. See also *United States* v. *Davidson*, D. C. N. D. N. Y., 244 F. 523, 534, 535; *Sunshine Book Co.* v. *Summerfield*, D. C. D. C., 128 F. Supp. 564.

Hence, having in mind Judge Hand's admonition in *United States* v. *Kennerley, supra*, D. C. S. D. N. Y., 209 F. 119, 121, that the jury must finally apply the standard thus indicated, we think there was nothing objectionable in the judge's instructions to the jury. Certainly, against this background, "filthy" is as clear and as easily understandable by the jury[6] as the terms "obscene" and "lewd" already committed to its care. Possibly some different nuances might have been given the term—though we are not sure what, nor are we given suggestions—but we cannot believe that the jury would have been helped. Nor did the defendant at the time find anything to question in the charge; his counsel, after the judge had granted all the specific additional requests he made, said that the judge had "fairly covered everything." Now he is not in a position to press this objection. Here we have more than a waiver by failure

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6 And by Judge Fuld and his colleagues; see *supra* note 2.

to object. We have in fact an instance of submission of issues to the jury on more than a single ground which might have been separated had the parties so desired. Since no request for separate verdicts or for withdrawal of this issue from the jury was made, the conviction must stand as supported by the clear evidence of obscenity. *United States* v. *Mascuch*, 2 Cir., 111 F. 2d 602, certiorari denied *Mascuch* v. *United States*, 311 U. S. 650; *United States* v. *Smith*, 2 Cir., 112 F. 2d 83, 86; *United States* v. *Goldstein*, 2 Cir., 168 F. 2d 666, 672; *Claassen* v. *United States*, 142 U. S. 140, 147; *Stevens* v. *United States*, 6 Cir., 206 F. 2d 64, 66; *Todorow* v. *United States*, 9 Cir., 173 F. 2d 439, 445, certiorari denied 337 U. S. 925; *United States* v. *Myers*, D. C. N. D. Cal., 131 F. Supp. 525, 528. On either ground, therefore, this assignment of error must fail.

Our conclusion here settles the substantial issues on this appeal. As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison. Very likely the jury's moderate verdict on only a few of the many counts submitted by the government and supported by the testimony of those who had been led to send their orders through the mail was because of this wide scope given the defense. As the judge pointed out in imposing sentence, defendant has been convicted several times before under both state and federal law. Indeed this case and our discussions somewhat duplicate his earlier appearance

in *Roth* v. *Goldman*, 2 Cir., 172 F. 2d 788, certiorari denied 337 U. S. 938.

Defendant claims error in entrapment because his advertisements were answered by government representatives. But this method of obtaining evidence was specifically approved in *Rosen* v. *United States*, *supra*, 161 U. S. 29, 42, and has been usual at least ever since. *Ackley* v. *United States*, 8 Cir., 200 F. 217, 222. In no event was there any improper entrapment. See *United States* v. *Masciale*, 2 Cir., Aug. 22, 1956. The government's summation in the case was within the scope of the evidence, and the court's charge was concise and correct. But one other matter needs to engage our attention. That was the defendant's claim of error in that the court charged with respect to the statute as it was at the time of the offenses, although it had been amended on June 28, 1955, or before the trial. But this amendment was designed to stiffen the Act and arose because in *Alpers* v. *United States*, 9 Cir., 175 F. 2d 137, a conviction for mailing obscene phonograph records was reversed on the ground that such records were not clearly embodied in the statutory language quoted above. Although this decision was reversed and the conviction reinstated in *United States* v. *Alpers*, *supra*, 333 U. S. 680, the Congress was so anxious that there be no loophole that it enacted an amendment making unmailable now "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."[7] It would seem clear, therefore, that defendant has no ground of complaint because he was tried under the statute existing at the time of his offense; and in no event could he have been harmed.

Judgment affirmed.

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[7] It also eliminated the former fifth paragraph now superfluous. See the Senate Report cited *supra* note 5.

FRANK, *Circuit Judge*, concurring:

The reference in Judge Clark's opinion to juvenile delinquency, might lead the casual reader to suppose that, under the statute, the test of what constitutes obscenity is its effect on minors, and that the defendant, Roth, has been convicted for mailing obscene writings to (or for sale to) children. This court, however, in *U. S.* v. *Levine*, 83 F. 2d 156 (C. A. 2), has held that the correct test is the effect on the sexual thoughts and desires, not of the "young" or "immature," but of average, normal, adult persons. The trial judge here so instructed the jury.*

On the basis of that test, the jury could reasonably have found, beyond a reasonable doubt, that many of the books, periodicals, pamphlets and pictures which defendant mailed were obscene. Accordingly, I concur.**

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* He said: "The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish. * * * In other words, you must determine its impact upon the average person in the community."

** The statute condemns the mailing not only of "obscene" matter but also of "filthy" matter. Parts of the indictment here charged the defendant with mailing "filthy" publications. The trial judge told the jury they could convict the defendant for mailing a "filthy" publication if they found that it treated "sexual matters in such a vulgar and indecent way so that it tends to arouse a feeling of disgust or aversion." The following contention might be urged:

> The very argument advanced to sustain the statute's validity, so far as it condemns the obscene, goes to show the invalidity of the statute so far as it condemns "filth," if "filth" means that which renders sexual desires "disgusting." For if the argument be sound that the legislature may constitutionally provide punishment for the obscene because, anti-socially, it arouses sexual desires by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial—and thus not the subject of valid legislation which punishes the mailing of "filthy" matter. To avoid this seeming inconsistency, the statute should be interpreted as follows: The mailing of a "filthy" matter is a crime if that matter tends to induce acts by the recipient which will cause breaches of the peace. This interpretation is in line with

I do so although I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years,* relative to the First Amendment as applied to other kinds of legislation. The doctrine expressed in those opinions, as I understand it, may be summarized briefly as follows: Any statute authorizing governmental interference (whether by "prior restraint" or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite to a breach of the peace,** or with sufficient probability tend either to the over-throw of the government by illegal means or to some other overt anti-social conduct.†

U. S. v. *Limehouse*, 285 U. S. 424. There the Court affirmed the conviction of a defendant who had mailed letters to divers persons which, in "foul language," accused them of sexual immorality. Those letters thus were within the category of "fighting words"—i.e., insulting words or the like—which may constitutionally be made criminal precisely because they tend to provoke breaches of the peace. Where, however, "filthy" language appears in a book, or picture, and involves no insults to particular persons, there will be no such consequences.

If this were the correct interpretation of "filthy," then that part of the statute condemning the "filthy" would not apply to the acts of the defendant here, and the judge's instructions re "filthy" would have been erroneous.

But I think we need not here consider that interpretation since I agree with my colleagues that, for the reasons they state, assuming there was error, the defendant's deliberate acquiescence in the judge's instructions prevents him from now so asserting.

* "For nearly 130 years after its adoption, the First Amendment received scant attention from the Supreme Court"; Emerson, The Doctrine of Prior Restraint, 20 L & Cont. Problems (1955) 648, 652.

** See, e.g., *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572.

† The judicial enforcement of private rights—as in suits, e.g., for defamation, injury to business, fraud, or invasion of privacy—comes within the exception.

The troublesome aspect of the federal obscenity statute —as I shall try to explain in the Appendix to this opinion— is that (a) no one can now show that, with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults, and (b) that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires—not overt dangerous or anti-social conduct, either actual or probable.

Often the discussion of First Amendment exceptions has been couched in terms of a "clear and present danger." However, the meaning of that phrase has been somewhat watered down by *Dennis* v. *U. S.*, 341 U. S. 494. The test now involves probability: "In each case (courts) must ask," said Chief Justice Vinson in *Dennis*, "whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." It has been suggested that the test now is this: "The more serious and threatened the evil, the lower the required degree of probability." * It would seem to follow that the less clear the danger, the more imminent must it be. At any rate, it would seem that (1) the danger or evil must be clear (i.e., identifiable) and substantial, and (2) that, since the statute renders words punishable, it is invalid unless those words tend, with a fairly high degree of probability, to incite to overt conduct which is obviously harmful. For, under the First Amendment, lawless or anti-social "acts are the main thing. Speech is not punishable for its own sake, but only because of its connection with those * * * acts * * * But more than a remote connection is neces-

* Lockhart and McClure, Obscenity and The Constitution, 38 Minn. L. Rev. (1954) 295, 357; *cf.* Kalven, The Law of Defamation and the First Amendment, in (University of Chicago) Conference on The Arts, Publishing and the Law (1952) 3, 12.

sary * * * ".* See, e.g., *Communications Ass'n* v. *Douds*, 339 U. S. 382, 398, as to "the right of the public to be protected from *evils of conduct*, even though the First Amendment rights of persons or groups are thereby in some manner infringed." (Emphasis added.)

As I read the Supreme Court's opinions, the government, in defending the constitutionality of a statute which curbs free expression, may not rely on the usual "presumption of validity." No matter how one may articulate the reasoning, it is now accepted doctrine that, when legislation affects free speech or free press, the government must show that the legislation comes within one of the exceptions described above. See, e.g., *Dennis* v. *U. S.*, 341 U. S. 494; *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, 503. Moreover, when legislation affects free expression, the void-for-vagueness doctrine has a peculiar importance; and the obscenity statute is exquisitely vague. (See the Appendix, point 9.)

True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved in recent years. I base that statement on the following analysis of the cases:

In *Ex parte Jackson*, 96 U. S. 727 (1877), the Court held valid a statute relating to the mailing of letters, or circulars, concerning lotteries. Such letters or circulars might well induce the addressees to engage in the overt conduct of engaging in lotteries. The Court, only

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* Chafee, The Blessings of Liberty (1956) 69.

in passing, referred to the obscenity statute and said it, too, was valid.

In *Rosen* v. *U. S.*, 161 U. S. 29 (1896), the issue was solely the sufficiency of an indictment under the obscenity statute, not the validity of that legislation, and the Court did not discuss its validity.

In *Van Swearingen* v. *U. S.*, 161 U. S. 446 (1896), the Court reversed a conviction under the obscenity statute; it did not consider its constitutionality.

Dunlop v. *U. S.*, 165 U. S. 486 (1896), did not discuss the constitutionality of the statute; moreover, the opinion (at 501) shows that it dealt with advertisements soliciting improper sexual relations, i.e., with probable conduct, not with mere thoughts or desires.

In *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904), which did not involve the validity of any obscenity Act, the Court said in passing (p. 508) that its constitutionality "has never been attacked."

In *U. S.* v. *Limehouse*, 285 U. S. 424 (1932), the Court decided the correct interpretation of the word "filthy" in the statute, and did not consider the question of constitutionality. Moreover, there the defendant had mailed letters attacking the characters of the recipients who might well have been moved to conduct in breach of the peace.

In *Winters* v. *New York*, 333 U. S. 507 (1948), the Court held void for vagueness a state statute making it a crime to distribute publications consisting principally of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes. The Court said in passing (p. 510) that legislation subjecting obscene publications to governmental control is valid.

In *Doubleday* v. *New York*, 335 U. S. 848 (1948), the Court, by an evenly divided vote, without opinion af-

firmed a state court decision sustaining a state obscenity statute.

In *U. S.* v. *Alpers,* 338 U. S. 680 (1950), the Court construed the statute as amended, and affirmed a conviction thereunder, but did not consider its constitutionality.

In the following cases, where the validity of no obscenity statute was involved, the Court, in passing, referred to such legislation as valid: *Robertson* v. *Baldwin,* 165 U. S. 275, 281 (1897); *Near* v. *Minnesota,* 283 U. S. 697, 716 (1931); *Lovell* v. *Griffin,* 303 U. S. 444, 451 (1938); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571-572 (1942); *Beauharnais* v. *Illinois,* 343 U. S. 250, 266 (1952).

I agree with my colleagues that, since ours is an inferior court, we should not hold invalid a statute which our superior has thus often said is constitutional (albeit without any full discussion). Yet I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity which, up to now, I think the Supreme Court has not discussed in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation. Perhaps I have overlooked conceivable compelling contrary arguments. If so, maybe my Appendix will evoke them.

To preclude misunderstanding of my purpose in stirring doubts about this statute, I think it well to add the following:

(a) As many of the publications mailed by defendant offend my personal taste, I would not cross a street to obtain them for nothing; I happen not to be interested in

so-called "pornography"; and I think defendant's motives obnoxious. But if the statute were invalid, the merit of those publications would be irrelevant. *Winters* v. *New York*, 333 U. S. 507, 510. So, too, as to defendant's motives: "Although the defendant may be the worst of men * * * the rights of the best of men are secure only as the right of the vilest and most abhorrent are protected." *

(b) It is most doubtful (as explained in the Appendix) whether anyone can now demonstrate that children's reading or looking at obscene matter has a probable causal relation to the children's anti-social conduct.** If, however, such a probable causal relation could be shown, there could be little doubt, I think, of the validity of a statute (if so worded as to avoid undue ambiguity) which specifically prohibits the distribution by mail of obscene publications for sale to young people. But discussion of such legislation is here irrelevant, since, to repeat, the existing federal statute is not thus restricted.

(c) Congress undoubtedly has wide power to protect public morals. But the First Amendment severely limits that power in the area of free speech and free press.

(d) It is argued that anti-obscenity legislation is valid because, at the time of the adoption of the First Amendment, obscenity was a common law crime. Relying (*inter alia*) on *Bridges* v. *California*, 341 U. S. 252, 264-265 and

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* Judge Cuthbert Pound dissenting in *People* v. *Gitlow*, 234 N. Y. 132, 158.

** The Appendix contains a discussion of the writings of those described by Judge Clark as persons "with competence in the premises." It tries to show (1) that the overwhelming majority of persons with such competence assert that there is no justification for the thesis that a demonstrable causal relation exists between reading or seeing the obscene and anti-social conduct, even of children, and (2) that the chief proponent of the opposite view with respect to the effect on children's conduct does not maintain the same as to adult conduct.

Grosjean v. *American Press*, 297 U. S. 233, 248-249, I have tried in the Appendix to answer that argument.

(e) The First Amendment, of course, does not prevent any private body or group (including any Church) from instructing, or seeking to persuade, its adherents or others not to read or distribute obscene (or other) publications. That constitutional provision—safeguarding a principle indispensable in a true democracy—leaves unhampered all non-governmental means of molding public opinion about not reading literature which some think undesirable; and, in that respect, experience teaches that democratically exercised censorship by public opinion has far more potency, and is far less easily evaded, than censorship by government.* The incessant struggle to influence public opinion is of the very essence of the democratic process. A basic purpose of the First Amendment is to keep that struggle alive, by not permitting the dominant public opinion of the present to become embodied in legislation which will prevent the formation of a different dominant public opinion in the future.**

(f) At first glance it may seem almost frivolous to raise any question about the constitutionality of the obscenity statute at a time when many seemingly graver First Amendment problems confront the courts. But (for reasons stated in more detail in the Appendix) governmental censorship

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* Public opinion, by influencing social attitudes, may create a convention, with no governmental "sanction" behind it, far more coercive than any statute. *Cf.* Holmes, Codes and The Arrangement of the Law, 2 Am. L. Rev. (1870) 4, 5.

Notably is this true of conventions as to obscenity: La Barre, Obscenity: An Anthropological Appraisal, 20 L & Con. Problems (1955) 533.

** The results of current public opinion may not always be happy. But our democracy accepts the postulate that, in the long run, the struggle to sway public opinion will produce the wisest policies. For further discussion of this theme, see the Appendix.

of writings, merely because they may stimulate, in the reader, sexual thoughts the legislature deems undesirable, has more serious implications than appear at first glance: We have been warned by eminent thinkers, of the easy path from any apparently mild governmental control of what adult citizens may read to governmental control of adult's political and religious reading. John Milton, Thomas Jefferson, James Madison, J. S. Mill and Tocqueville have pointed out that any paternalistic guardianship by government of the thoughts of grown-up citizens enervates their spirit, keeps them immature, all too ready to adopt towards government officers the attitude that, in general, "Papa knows best." If the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds? And even if we confine attention to official censorship of publications tending to stimulate sexual thoughts, it should be asked why, at any moment, that censorship cannot be extended to advertisements and true reports or photographs, in our daily press, which, fully as much, may stimulate such thoughts?

(g) Assuming, *arguendo,* that a statute aims at an altogether desirable end, nevertheless its desirability does not render it constitutional. As the Supreme Court has said, "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislatures of good purpose to promote it without thought of the serious break it will make in the ark of our covenant. * * *"*

In a concurring opinion in *Roth* v. *Goldman,* 172 F. 2d 788, 790 (1948), I voiced puzzlement about the constitution-

* The Child Labor Tax Case, 259 U. S. 20, 37.

ality of administrative prior restraint of obscene books. I then had little doubt about the validity of a purely punitive obscenity statute. But the next year, in *Commonwealth* v. *Gordon*, 6 Pa. C & D 101 (1949), Judge Curtis Bok, one of America's most reflective judges, directly attacked the validity of any such punitive legislation. His brilliant opinion, which states arguments that (so far as I know) have never been answered, nudged me into the skeptical views contained in this opinion and the Appendix.

APPENDIX

As a judge of an inferior court, I am constrained by opinions of the Supreme Court concerning the obscenity statute to hold that legislation valid. Since, however, I think (as indicated in the foregoing) that none of those opinions has carefully canvassed the problem in the light of the Supreme Court's interpretation of the First Amendment, especially as expressed by the Court in recent years, I deem it not improper to set forth, in the following, factors which I think deserve consideration in passing on the constitutionality of that statute.

1.

Benjamin Franklin, in 1776 unanimously designated Postmaster General by the First Continental Congress, is appropriately known as the "father of the Post Office." Among his published writings are two[1]—*Letter of Advice to Young Men on the Proper Choosing of a Mistress* and *The Speech of Polly Baker*—which a jury could reasonably find "obscene," according to the judge's instructions in the case at bar. On that basis, if tomorrow a man were to send those works of Franklin through the mails, he would be subject to prosecution and (if the jury found him guilty) to punishment under the federal obscenity statute.[2]

That fact would surely have astonished Jefferson, who extolled Franklin as an American genius,[3] called him "venerable and beloved" of his countrymen,[4] and wrote approv-

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1 See Van Doren, Benjamin Franklin (1938) 150-151, 153-154. Franklin's *Letter to The Academy of Brussels* (see Van Doren, 151-152) might be considered "filthy."

2 18 U. S. C. Section 1461.

3 Jefferson, Notes on the State of Virginia (1781-1785), Query VI; See Padover, The Complete Jefferson (1943) 567 at 612.

4 Jefferson, Autobiography (1821); See Padover, *loc. cit.*, 1119 at 1193.

ingly of Franklin's *Polly Baker*.[5] No less would it have astonished Madison, also an admirer of Franklin (whom he described as a man whose "genius" was "an ornament of human nature")[5a] and himself given to telling "Rabelaisian anecdotes."[6] Nor was the taste of these men unique in the American Colonies: "Many a library of a colonial planter in Virginia or a colonial intellectual in New England boasted copies of Tom Jones, Tristram Shandy, Ovid's Art of Love, and Rabelais. * * * "[7]

As, with Jefferson's encouragement, Madison, in the first session of Congress, introduced what became the First Amendment, it seems doubtful that the constitutional guaranty of free speech and free press could have been intended

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5 Jefferson, Anecdotes of Franklin (1818); see Padover, *loc. cit.*, 892 at 893.

5a On Franklin's death, Madison offered the following resolution which the House of Representatives unanimously adopted: "The House being informed of the decease of Benjamin Franklin, a citizen whose genius was not more of an ornament of human nature than his various exertions of it have been to science, to freedom and to his country, do resolve, as a mark of veneration due to his memory, that the members wear the customary badge of mourning for one month." Brant, James Madison, Father of the Constitution (1950) 309; Annals, April 22, 1790.

6 Padover, The Complete Madison (1953) 8-9.

George Washington, who knew Franklin well, treasured a gold-headed cane given him by Franklin. See Padover, The Washington Papers (1955) 112.

See Judge Bok, in *Commonwealth* v. *Gordon*, 66 Pa. D & C 101, 120-121: "One need only recall that the father of the post office, Benjamin Franklin, wrote and presumably mailed his letter of Advice to Young Men on the Proper Choosing of a Mistress; that Thomas Jefferson worried about the students at his new University of Virginia having a respectable brothel; that Alexander Hamilton's adultery while holding public office created no great scandal * * * "

7 Ernst and Seagle, To The Pure (1928) 108.

Everyone interested in obscenity legislation owes a deep debt to many writings on the subject by Morris Ernst. For such an acknowledgment, see Acknowledgments in Blanshard, The Right to Read (1955).

to allow Congress validly to enact the "obscenity" Act. That doubt receives reinforcement from the following:

In 1799, eight years after the adoption of the First Amendment, Madison, in an Address to the General Assembly of Virginia,[8] said that the "truth of opinion" ought not to be subject to "imprisonment, to be inflicted by those of a different opinion"; he there also asserted that it would subvert the First Amendment[9] to make a "distinction between the freedom and the licentiousness of the press." Previously, in 1792, he wrote that "a man has property in his opinions and free communication of them," and that a government which "violates the property which individuals have in their opinion * * * is not a pattern for the United States."[10] Jefferson's proposed Constitution for Virginia (1776), provided: "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."[11] In his Second Inaugural Address (1805), he said: "No inference is here intended that the laws provided by the State against false and defamatory publications should not be enforced * * * The press, confined to truth, needs no other restraint * * *; and no other definite line can be drawn between the inestimable liberty of the press and demoralizing licentiousness. If there still be improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion."

The broad phrase in the First Amendment, prohibiting legislation abridging "freedom of speech or of the press," includes the right to speak and write freely for the public

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8 See Padover, The Complete Madison (1953) 295-296.

9 Madison referred to the "Third Amendment," but the context shows he meant the First.

10 See Padover, The Complete Madison (1953) 267, 268-269.

11 Padover, The Complete Jefferson (1943) 109.

concerning any subject. As the Amendment specifically refers "to the free exercise of religion" and to the right "of the people to assemble" and to "petition the government for a redress of grievances," it specifically includes the right freely to speak to and write for the public concerning government and religion; but it does not limit this right to those topics. Accordingly, the views of Jefferson and Madison about the freedom to speak and write concerning religion are relevant to a consideration of the constitutional freedom in respect of all other subjects. Consider, then, what those men said about freedom of religious discussion: Madison, in 1799, denouncing the distinction "between the freedom and the licentiousness of the press" said, "By its help, the judge as to what is licentious may escape through any constitutional restriction," and added, "Under it, Congress might denominate a religion to be heretical and licentious, and proceed to its suppression * * * Remember * * * that it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion * * * ".[12] Jefferson, in 1798, quoting the First Amendment, said it guarded "in the same sentence, and under the same words, the freedom of religion, of speech, and of the press; insomuch, that whatever violates either, throws down the sanctuary which covers the others." [13] In 1814, he wrote in a letter, "I am really mortified to be told that in the United States of America, a fact like this (the sale of a book) can become a subject of inquiry, and of criminal inquiry too, as an offense against religion; that (such) a question can be carried before the civil magistrate. Is this then our freedom of religion? And are we to have a censor whose imprimatur shall say what books may be sold and what we

12 Madison, Address to the General Assembly of Virginia, 1799; see Padover, The Complete Madison (1953) 295.

13 See Padover, The Complete Jefferson (1943) 130.

may buy? * * * Whose foot is to be the measure to which ours are all to be cut or stretched?" [14]

Those utterances high-light this fact: Freedom to speak publicly and to publish has, as its inevitable and important correlative, the private rights to hear, to read, and to think and to feel about what one hears and reads. The First Amendment protects those private rights of hearers and readers.

We should not forget that, prompted by Jefferson,[15] Madison (who at one time had doubted the wisdom of a Bill of Rights)[16] when he urged in Congress the enactment of what became the first ten Amendments, declared, "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable barrier against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." [17] In short, the Bill of Rights, including the First Amendment, was not designed merely as a set of admonitions to the legislature and the executive; its provisions were to be enforced by the courts.

Judicial enforcement necessarily entails judicial interpretation. The question therefore arises whether the courts, in enforcing the First Amendment, should interpret it in

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14 See Padover, The Complete Jefferson (1943) 889.

15 Jefferson's Letter to Madison (1789); Padover, The Complete Jefferson (1943) 123-125. See also Brant, James Madison, Father of the Constitution (1950) 267.

16 The Federalist No. 84; Cahn, The Firstness of the First Amendment, 65 Yale L. J. (1956) 464.

17 Madison, Writings (Hunt ed.) V, 385; Corwin, Liberty Against Government (1948) 58-59; Cahn, The Firstness of the First Amendment, 64 Yale L. J. (1956) 464, 468.

accord with the views prevalent among those who sponsored and adopted it or in accord with subsequently developed views which would sanction legislation more restrictive of free speech and free press.

So the following becomes pertinent: Some of those who in the 20th Century endorse legislation suppressing "obscene" literature have an attitude towards freedom of expression which does not match that of the framers of the First Amendment (adopted at the end of the 18th Century) but does stem from an attitude, towards writings dealing with sex, which arose decades later, in the mid-19th Century, and is therefore labelled—doubtless too sweepingly—"Victorian." It was a dogma of "Victorian morality" that sexual misbehavior would be encouraged if one were to "acknowledge its existence or at any rate to present it vividly enough to form a life-like image of it in the reader's mind"; this morality rested on a "faith that you could best conquer evil by shutting your eyes to its existence," [18] and on a kind of word magic.[19] The demands at that time for "decency" in published words did not comport with the actual sexual conduct of many of those who made those demands: "The Victorians, as a general rule, managed to conceal the 'coarser' side of their lives so thoroughly under a mask of respectability that we often fail to realize how 'coarse' it really was * * * Could we have recourse to the vast unwritten literature of bawdry, we should be able to form a more veracious notion of life as it (then) really was." The respectables of those days often, "with unblush-

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18 Wingfield-Stratford, Those Earnest Victorians (1930) 151.

19 See Kaplan, Obscenity as an Esthetic Category, 20 Law & Contemp. Problems (1955) 544, 550: "In many cultures, obscenity has an important part in magical rituals. In our own, its magical character is betrayed in the puritan's supposition that words alone can work evil, and that evil will be averted if only the words are not uttered."

ing license," held "high revels" in "night houses." [20] Thanks to them, Mrs. Warren's profession flourished, but it was considered sinful to talk about it in books.[21] Pretty obviously, those "Victorians" did not suppress obscene books in the belief that the reading of those books induced the very sexual behavior which the suppressors themselves practiced. Such a prudish and purely verbal moral code, at odds (more or less hypocritically) with the actual conduct of its adherents[22] was (as we have seen) not the moral code of those who framed the First Amendment.[23] One would suppose, then, that the courts should interpret and enforce that Amendment according to the views of those framers, not according to the later "Victorian" code.[24]

The "founding fathers" did not accept the common law concerning freedom of expression

It has been argued that the federal obscenity statute is valid because obscenity was a common law crime at the time of the adoption of the First Amendment. Quite aside from

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20 Wingfield-Stratford, *loc. cit.*, 296-297.

21 Paradoxically, this attitude apparently tends to "create" obscenity. For the foundation of obscenity seems to be secrecy and shame: "The secret becomes shameful because of its secrecy." Kaplan, Obscenity As An Esthetic Category, 20 Law & Contemp. Problems (1955) 544, 556.

22 To be sure, every society has "pretend-rules" (moral and legal) which it publicly voices but does not enforce. Indeed, a gap necessarily exists between a society's ideals, if at all exalted, and its practices. But the extent of the gap is significant. See, *e.g.*, Frank, Lawlessness, Encyc. of Soc. Sciences (1932); *cf.* Frank, Preface to Kahn, A Court for Children (1953).

23 It is of interest that not until the Tariff Act of 1824 did Congress enact any legislation relative to obscenity.

24 For discussion of the suggestion that many constitutional provisions provide merely minimum safeguards which may properly be enlarged—not diminished—to meet newly emerging needs and policies, see Supreme Court and Supreme Law (Cahn ed. 1954) 59-64.

the fact that, previous to the Amendment, there had been scant recognition of this crime, the short answer seems to be that the framers of the Amendment knowingly and deliberately intended to depart from the English common law as to freedom of speech and freedom of the press. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249; *Bridges* v. *California*, 314 U. S. 252, 264-265;[24a] Patterson,

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24a In *Bridges* v. *California*, 314 U. S. 252, 264-265, the Court said: "In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' Schofield, Freedom of the Press in the United States, 9 Publications Amer. Sociol. Soc., 67, 76. More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment said: 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body (Parliament), the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.' 1 Annals of Congress 1789-1790, 434. And Madison elsewhere wrote that 'the state of the press * * * under the common law cannot * * * be the standard of its freedom in the United States.' VI Writings of James Madison 1790-1802, 387. There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other

Free Speech and a Free Press (1939) 101-102, 124-125, 128; Schofield, 2 Constitutional Law and Equity (1921) 521-525.

Of course, the legislature has wide power to protect what it considers public morals. But the First Amendment severely circumscribes that power (and all other legislative powers) in the area of speech and free press.

Subsequent punishment as, practically, prior restraint

For a long time, much was made of the distinction between a statute calling for "prior restraint" and one providing subsequent criminal punishment;[25] the former alone,

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liberties, the broadest scope that could be countenanced in an orderly society."

In *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249, the Court said: "It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship for this abuse had then permanently disappeared from English practice. * * * Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. *Continental-Illinois Nat. Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 668-669. And, obviously, it is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276-277; *Waring* v. *Clarke*, 5 How. 441, 454-457; *Powell* v. *Alabama, supra*, pp. 60-65. In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists. * * *"

25 Blackstone, most influentially, made this distinction; 4 Blackstone, Commentary, 151-162. His condonation of punishment reflected the views of his patron, Lord Mansfield, who, an opponent of a free press, took an active part in punishing published criticism of the government. But men like Jefferson and James Wilson abhorred the Tory political views of Blackstone and Mansfield, both of whom had ranked high in the opposition to the American Colonists. Jefferson wrote to Madison of "the horrid Mansfieldism of Blackstone which had caused many young American lawyers to slide into Toryism." Jefferson applauded Tucker's "republicanized" edition of Blackstone published in 1803. See Frank, A Sketch of An Influence, in the volume Interpretations of

it was once said, raised any question of constitutionality *vis-à-vis* the First Amendment.[26] Although it may still be true that more is required to justify legislation providing "preventive" than "punitive" censorship,[27] this distinction has been substantially eroded. See, e.g., *Dennis* v. *U. S.*, 341 U. S. 494; *Schenck* v. *U. S.*, 249 U. S. 47; *DeJonge* v. *Oregon*, 299 U. S. 353; *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 note 3. See also Hale, Freedom Through Law (1952) 257-265; Emerson The Doctrine of Prior Restraint, 20 Law & Contemp. Problems (1955) 648 (a thought-stirring discussion of the problem); Kalven, loc. cit. at 8-10, 13. (For further discussion of this theme, see *infra*.)

The statute, as judicially interpreted, authorizes punishment for inducing mere thoughts, and feelings, or desires

For a time, American courts adopted the test of obscenity contrived in 1868 by Cockburn, *L.J.*, in *Queen* v. *Hicklin*, L.R. 3 Q.B. 360: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall." He added that the book there in question "would suggest * * * thoughts of a most impure and libidinous character."

Modern Legal Philosophers (1947) 189, especially 231; see also 191, 196-198, 205, 207, 210, 215-217. For James Wilson's denunciation of Blackstone's political attitudes, see, *e.g.*, Wilson's opinion in *Chisholm* v. *Georgia*, 2 Dall. 419, 453, 458, 462.

26 See Holmes, *J.* in *Patterson* v. *Colorado*, 205 U. S. 454 (1907) citing Blackstone. But compare his subsequent dissenting opinion in *Abrams* v. *U. S.*, 250 U. S. 616, 624 (1919), which abandons Blackstone's dichotomy.

27 For these phrases, see Lasswell, Censorship, 3 Ency. of Soc. Sc. (1930) 290, 291.

The test in most federal courts has changed: They do not now speak of the thoughts of "those whose minds are open to * * * immoral influences" but, instead, of the thoughts of average adult normal men and women, determining what these thoughts are, not by proof at the trial, but by the standard of "the average conscience of the time," the current "social sense of what is right." See, e.g., *U. S.* v. *Kennerly,* 209 F. 119, 121; *U. S.* v. *Levine,* 83 F. 2d 156, 157; *Parmelee* v. *U. S.,* 113 F. 2d 729 (App. D. C.). Yet the courts still define obscenity in terms of the assumed average normal adult reader's sexual thoughts or desires or impulses, without reference to any relation between those "subjective" reactions and his subsequent conduct. The judicial opinions use such key phrases as this: "suggesting lewd thoughts and exciting sensual desires";[28] "arouse the salacity of the reader," [29] "allowing or implanting * * * obscene, lewd or lascivious thoughts or desires," [30] "arouse sexual desires." [30a] The judge's charge in the instant case reads accordingly: "It must tend to stir sexual impulses and lead to sexually impure thoughts." Thus the statute, as the courts construe it, appears to provide criminal punishment for inducing no more than thoughts, feelings, desires.

No adequate knowledge is available concerning the effects on the conduct of normal adults of reading or seeing the "obscene."

Suppose we assume, *arguendo,* that sexual thoughts or feelings, stirred by the "obscene," probably will often issue

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28 *U. S.* v. *Dennett,* 39 F. 2d 564, 568 (C. A. 2).

29 *U. S.* v. *Levine,* 83 F. 2d 156, 158 (C. A. 2).

30 *Burstein* v. *U. S.,* 178 F. 2d 665, 667 (C. A. 9).

30a *American Civil Liberties Union* v. *Chicago,* 3 Ill. (2d) 334, 121 N. E. (2d) 585.

into overt conduct. Still it does not at all follow that that conduct will be anti-social. For no sane person can believe it socially harmful if sexual desires lead to normal sexual behavior since without such behavior the human race would soon disappear.[31]

Doubtless, Congress could validly provide punishment for mailing any publications if there were some moderately substantial reliable data showing that reading or seeing those publications probably conduces to seriously harmful sexual conduct on the part of normal adult human beings. But we have no such data.

Suppose it argued that whatever excites sexual longings might *possibly* produce sexual misconduct. That cannot suffice. Notoriously, perfumes sometimes act as aphrodisiacs, yet no one will suggest that therefore Congress may constitutionally legislate punishment for mailing perfumes. In truth, the stimuli to irregular sexual conduct, by normal men and woman, may be almost anything—the odor of carnations or cheese, the sight of a cane or a candle or a shoe, the touch of silk or a gunny-sack. For all anyone now knows, stimuli of that sort may be far more provocative of such misconduct than reading obscene books or seeing obscene pictures. Said John Milton, "Evil manners are as perfectly learnt, without books, a thousand other ways that cannot be stopped."

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31 *Cf.* the opinion of Mr. Justice Codd in *Integrated Press* v. *The Postmaster General*, as reported in Herbert, Codd's Last Case (1952) 14, 16: "Nor is the Court much impressed by the contention that the frequent contemplation of young ladies in bathing dresses must tend to the moral corruption of the community. On the contrary, these ubiquitous exhibitions have so diminished what was left of the mystery of womanhood that they might easily be condemned upon another ground of public policy, in that they tended to destroy the natural fascination of the female, so that the attention of the male population was diverted from thoughts of marriage to cricket, darts, motor-bicycling and other occupations which do nothing to arrest the decline of the population."

Effect of "obscenity" on adult conduct

To date there exists, I think, no thorough-going studies by competent persons which justifies the conclusion that normal adults' reading or seeing of the "obscene" probably induces anti-social conduct. Such studies do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that "obscenity" represents a ponderable causal factor in sexually deviant adult behavior. "Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior." [32] What little competent research has been done, points definitely in a direction precisely opposite to that assumption.

Alpert reports[33] that, when, in the 1920s, 409 women college graduates were asked to state in writing what things stimulated them sexually, they answered thus: 218 said "Man"; 95 said books; 40 said drama; 29 said dancing; 18 said pictures; 9 said music. Of those who replied "that the source of their sex information came from books, not one specified a 'dirty' book as the source. Instead, the books listed were: The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal diseases, medical books, and Motley's Rise of the Dutch Republic." Macaulay, replying to advocates of the suppression of obscene books, said: "We find it difficult to believe that in a world so full of temptations as this, any

32 Lockhart and McClure, Obscenity and The Courts, 20 L. & Contemp. P. (1955) 587, 595.

33 See Alpert, Judicial Censorship and The Press, 52 Harv. L. Rev. (1938) 40, 72.

gentleman whose life would have been virtuous if he had not read Aristophanes or Juvenal, will be vicious by reading them." Echoing Macaulay, "Jimmy" Walker remarked that he had never heard of a woman seduced by a book. New Mexico has never had an obscenity statute; there is no evidence that, in that state, sexual misconduct is proportionately greater than elsewhere.

Effect on conduct of young people

Most federal courts (as above noted) now hold that the test of obscenity is the effect on the "mind" of the average normal adult, that effect being determined by the "average conscience of the time," the current "sense of what is right"; and that the statute does not intend "to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few"; *U. S.* v. *Kennerley,* 209 F. 120, 121.

However, there is much pressure for legislation, designed to prevent juvenile delinquency, which will single out children, i.e., will prohibit the sale to young persons of "obscenity" or other designated matter. That problem does not present itself here, since the federal statute is not thus limited. The trial judge in his charge in the instant case told the jury that the "test" under that statute is not the effect of the mailed matter on "those comprising a particular segment of the community, the "young" or "the immature"; and see *U. S.* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2).

Therefore a discussion of such a children's protective statute is irrelevant here. But, since Judge Clark does discuss the alleged linkage of obscenity to juvenile delinquency, and since it may perhaps be thought that it has some bearing on the question of the effect of obscenity on adult conduct, I too shall discuss it.

The following is a recent summary of studies of that subject: "(1) Scientific[33a] studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other nonactive entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any were read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubts concerning the basic hypothesis on which obscenity censorship is dependent. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the

33a I, for one, deplore the use of the word "scientific" as applied to social studies. See, *e.g.*, Frank, 4 J. of Public Law (1955) 8.

community sex standards. * * * And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society." [34]

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34 Novick, Superintendent of the New York Training School for Girls, writes: "In the public eye today juvenile delinquency is alternately the direct result of progressive education, horror comics, T. V. programs, and other pet peeves of our present society * * * This is not a new phenomenon. Each generation of adults has been concerned about the behavior of its children and has looked for a scapegoat on which to place the blame for its delinquency. At the same time, adults have always sought a panacea which would cure the problem. It is sufficient to note that delinquency has always risen during periods of stress and strain, and the era in which we are living is no exception * * *. Neither do restrictive measures such as * * * censorship of reading matter * * * prevent delinquency. They merely have an effect upon the manner in which the delinquency will be expressed." Novick, Integrating the Delinquent and His Community, 20 Fed. Probation, 38, 40 (1956).

Charles Lamb (whose concern with children he manifested in his *Tales From Shakespeare*) had no belief that uncensored reading harmed children: In his *Essays of Elia* he wrote of the education of his cousin Bridget, "She was tumbled early into a spacious closet of good old English reading" (which included Elizabethen and Restoration dramas and 18th century novels) "without much selection or prohibition and browsed at will upon that fair and wholesome pasturage. Had I twenty girls, they should be brought up exactly in this fashion."

Judge Curtis Bok, perhaps remembering Lamb's remarks, said of the publications before him in *Commonwealth* v. *Gordon*, 66 P. & D. 101 (1949): "It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every

Judge Clark, however, speaks of "the strongly held views of those with competence in the premises as to the very direct connection" of obscenity "with the development of juvenile delinquency." In support of this statement, he cites and quotes from a recent opinion of the New York Court of Appeals and an article by Judge Vanderbilt, which in turn, cite the writings of persons thus described by Judge Clark as "those with competence in the premises." One of the cited writings is a report, by Dr. Jahoda and associates, entitled The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954).[35] I have read this report (which is a careful survey of all available studies and psychological theories). I think it expresses an attitude quite contrary to that indicated by Judge Clark. In order to avoid any possible bias in my

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day, young and old. Our daughters must live in the world and decide what sort of women they are to be, and we should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance. If that choice be made in the open sunlight, it is more apt than when made in shadow to fall on the side of honorable behavior."

Watson writes similarly: "What innocent children most need is not a sterile environment from which all evidence of * * * lust * * * has been removed, but help in interpreting the evil which is an inescapable part of life. Home, school and church should cooperate not to create an artificial hot-house insulation for life's realities but to enable children to respond, "Ah, yes! I understand!" Most children in middle class homes alarm their parents by spells in which they overdo imaginative violence, sex talk, worry about death, listening to cowboy programs, reading inane comics, exchanging dirty stories, and most of them in time, with or without adult counsel, will work their way through to better standards of taste. Protection by censorship might leave such children weaker and more susceptible; some of these childhood interests, like measles, contribute to a later life of useful immunity." Watson, Some Effects on Censorship upon Society, in 5 Social Meaning of Legal Concepts (1953) 73, 83-85.

Said Milton: "They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin." A renowned sinner declared that he "could resist everything but temptation."

35 Cited in a passage in *Brown* v. *Kingsley Books, Inc.*, 1 N. Y. (2d) 639, quoted by Judge Clark.

interpretation of that report, I thought it well to ask Dr. Jahoda to write her own summary of it, which, with her permission, I shall quote. (In doing so, I am following the example of Mr. Justice Jackson who, in *Fed. Trade Commission* v. *Ruberoid*, 343 U. S. 470, 485, acknowledged that he relied on "an unpublished treatise," i.e., one not available to the parties. If that practice is proper, I think it similarly proper to quote the author's unpublished interpretation of a published treatise.) Dr. Jahoda's summary reads as follows:

"Persons who argue for increased censorship of printed matter often operate on the assumption that reading about sexual matters or about violence and brutality leads to antisocial actions, particularly to juvenile delinquency. An examination of the pertinent psychological literature has led to the following conclusions:

"1. There exists no research evidence either to prove or to disprove this assumption definitively.

"2. In the absence of scientific proof two lines of psychological approach to the examination of the assumption are possible: (a) a review of what is known on the causes of juvenile delinquency; and (b) review of what is known about the effect of literature on the mind of the reader.

"3. In the vast research literature on the causes of juvenile delinquency there is no evidence to justify the assumption that reading about sexual matters or about violence leads to delinquent acts. Experts on juvenile delinquency agree that it has no single cause. Most of them regard early childhood events, which precede the reading age, as a necessary condition for later delinquency. At a later age, the nature of personal relations is assumed to have much greater power in determining a delinquent career than the vicarious experiences provided by reading matter.

Juvenile delinquents as a group read less, and less easily, than non-delinquents. Individual instances are reported in which so-called 'good' books allegedly influenced a delinquent in the manner in which 'bad' books are assumed to influence him.

"Where childhood experiences and subsequent events have combined to make delinquency psychologically likely, reading could have one of two effects: it could serve a trigger function releasing the criminal act or it could provide for a substitute outlet of aggression in fantasy, dispensing with the need for criminal action. There is no empirical evidence in either direction.

"4. With regard to the impact of literature on the mind of the reader, it must be pointed out that there is a vast overlap in content between all media of mass communication. The daily press, television, radio, movies, books and comics all present their share of so-called 'bad' material, some with great realism as reports of actual events, some in clearly fictionalized form. It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them. Some evidence suggests that the particular communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose themselves to everything that is offered, but only to what agrees with their inclinations.

"Children, who have often not yet crystallized their preferences and have more unspecific curiosity than many adults, are therefore perhaps more open to accidental influences from literature. This may present a danger to youngsters who are insecure or maladjusted who find in reading (of 'bad' books as well as of 'good' books) an escape from reality which they do not dare face. Needs which are not met in the real world are gratified in a fantasy world. It is likely, though not fully demonstrated, that excessive reading of comic books will intensify in

children those qualities which drove them to the comic book world to begin with: an inability to face the world, apathy, a belief that the individual is hopelessly impotent and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world.

"It should be noted that insofar as causal sequence is implied, insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to these potential effects. Unfortunately, perhaps, the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales might do much the same."

Most of the current discussion of the relation between children's reading and juvenile delinquency has to do with so-called "comic books" which center on violence (sometimes coupled with sex) rather than mere obscenity. Judge Vanderbilt, in an article from which Judge Clark quotes, cites Feder, Comic Book Regulation (University of California, Bureau of Public Administration, 1955 Legislative Problems No. 2).[36] Feder writes: "It has never been determined definitely whether or not comics portraying violence, crime and horror are a cause of juvenile delinquency."

Judge Vanderbilt, in the article from which Judge Clark quotes, also cites Wertham, Seduction of the Innocent (1954).[37] Dr. Wertham is the foremost proponent of the view that "comic books" do contribute to juvenile delinquency. The Jahoda Report takes issue with Dr. Wertham, who relies much on a variety of the *post-hoc-ergo-propter-hoc* variety of argument, i.e., youths who had read "comic books" became delinquents. The argument, at best, proves too much: Dr. Wertham points to the millions of young readers of such books; but only a fraction of these readers become delinquents. Many of the latter also chew gum,

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36 Vanderbilt, Impasse In Justice, Wash. U. L. Q. (1956), 267, 302.

37 *Ibid.*

drink coca-cola, and wear soft-soled shoes. Moreover, Dr. Wertham specifically says (p. 298) that he is little concerned with allegedly obscene publications designed for reading by adults, and (pp. 303, 316, 348) that the legislation which he advocates would do no more than forbid the sale or display of "comic books" to minors. Since, as previously noted, the federal obscenity statute is not so restricted, even Dr. Wertham's book does not support Judge Clark's position.

Maybe some day we will have enough reliable data to show that obscene books and pictures do tend to influence children's sexual conduct adversely. Then a federal statute could be enacted which would avoid constitutional defects by authorizing punishment for using the mails or interstate shipments in the sale of such books and pictures to children.[38]

It is, however, not at all clear that children would be ignorant, in any considerable measure, of obscenity, if no obscene publications ever came into their hands. Youngsters get a vast deal of education in sexual smut from companions of their own age.[39] A verbatim report of conversations

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38 Such a statute was long ago suggested. See Ernst and Seagle, To the Pure (1928) 277.

39 Cf. *U. S.* v. *Dennett*, 39 F. 2d 564, 568 (C. A. 2).

Alpert (*loc. cit.* at 74) writes of the American Youth Commission study of the conditions and attitudes of young people in Maryland between the ages of sixteen and twenty-four, as reported in 1938: "For this study Maryland was deliberately picked as a 'typical' state, and, according to the Commission, the 13,528 young people personally interviewed in Maryland can speak for the two hundred and fifty thousand young people in Maryland and the twenty millions in the United States. 'The chief source of sex "education" for the youth of all ages and all religious groups was found to be the youth's contemporaries.' Sixty-six percent of the boys and forty percent of the girls reported that what they knew about sex was more or less limited to what their friends of their own age had told them. After 'contemporaries' and the youth's home, the source that is next in importance is the school from which about 8 percent of the young people reported they had

among young teen-age boys (from average respectable homes) will disclose their amazing proficiency in obscene language, learned from other boys.[40] Replying to the argument of the need for censorship to protect the young, Milton said: "Who shall regulate all the * * * conversation of our youth * * * appoint what shall be discussed * * * ?" Most judges who reject that view are long past their youth and have probably forgotten the conversational ways of that period of life: "I remember when I was a little boy," said Mr. Dooley, "but I don't remember how I was a little boy."

The obscenity statute and the reputable press.

Let it be assumed, for the sake of the argument, that contemplation of published matter dealing with sex has a significant impact on children's conduct. On that assumption, we cannot overlook the fact that our most reputable newspapers and periodicals carry advertisements and photographs displaying women in what decidedly are sexually alluring postures,[41] and at times emphasizing the

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received most of their sex information. A few, about 4 percent, reported they owed most to books, while less than 1 percent asserted that they had acquired most of their information from movies. Exactly the same proportion specified the church as the chief source of their sex information. These statistical results are not offered as conclusive; but that they do more than cast doubt upon the assertion that 'immoral' books, corrupt and deprave must be admitted. These statistical results placed in the scale against the weight of the dogma upon which the law is founded lift the counterpane high. Add this: that 'evil manners' are as easily acquired without books as with books; that crowded slums, machine labor, barren lives, starved emotions, and unreasoning minds are far more dangerous to morals than any so-called obscene literature. True, this attack is tangential, but a social problem is here involved, and the weight of this approach should be felt." *Id.* at 74.

40 For such a report, slightly expurgated for adult readers, see Cleckley, The Mask of Sanity (1950) 135-137.

41 *Cf.* Larrabee, The Cultural Context of Sex Censorship, 20 L. & Contemp. Prob. (1955) 672, 684.

importance of "sex appeal." That women are there shown scantily clad, increases "the mystery and allure of the bodies that are hidden," writes an eminent psychiatrist. "A leg covered by a silk stocking is much more attractive than a naked one; a bosom pushed into shape by a brassiere is more alluring than the pendant realities."[42] Either, then, the statute, must be sternly applied to prevent the mailing of many reputable newspapers and periodicals containing such ads and photographs, or else we must acknowledge that they have created a cultural atmosphere for children in which, at a maximum, only the most trifling additional effect can be imputed to children's perusal of the kind of matter mailed by the defendant.

The obscenity statute and the newspapers

Because of the contrary views of many competent persons, one may well be sceptical about Dr. Wertham's thesis. However, let us see what, logically, his crusade would do the daily press: After referring repeatedly to the descriptions, in "comic books" and other "mass media," of violence combined with sadistic sexual behavior, descriptions which he says contribute to juvenile delinquency, he writes, "Juvenile delinquency reflects the social values current in a society. Both adults and children absorb these social values in their daily lives, * * * and also in *all the communications through the mass media* * * * Juvenile delinquency holds up a mirror to society * * * It is self-understood that such a pattern in a mass medium does not come from nothing * * *

42 Myerson, Speaking of Man (1950) 92. See also the well known chapter on clothes in Anatole France's Penguin Island.

Dr. Wertham discussing "comic books," makes much of the advertisements they carry. He speaks of their "breast ads," and also of their playing up of "glamour girls," their stress on the "sexy," their emphasis on women's "secondary sexual characteristics." Is not this also descriptive of the advertisements in our "best periodicals"?

Comic books are not the disease, they are only a symptom * * * The same social forces that made comic books make other social evils, and the same social forces that keep comic crime books keep the other social evils the way they are." (Emphasis added.)

Now the daily newspapers, especially those with immense circulations, constitute an important part of the "mass media"; and each copy of a newspaper sells for much less than a "comic book." Virtually all the descriptions, of sex mingled with violence, which Dr. Wertham finds in the "comic books," can be found, often accompanied by gruesome photographs, in those daily journals. Even a newspaper which is considered unusually respectable, published prominently on its first page, on August 26, 1956, a true story of a "badly decomposed body" of a 24 year old woman school teacher, found in a clump of trees. The story reported that police had quoted a 29 year old salesman as saying that "he drove to the area" with the school teacher, that "the two had relations on the ground, and later got into an argument," after which he "struck her three times on the back of the head with a rock, and, leaving her there, drove away." One may suspect that such stories of sex and violence in the daily press have more impact on young readers than do those in the "comic books," since the daily press reports reality while the "comic books" largely confine themselves to avowed fiction or fantasy. Yet Dr. Wertham, and most others who propose legislation to curb the sale of "comic books" to children, propose that it should not extend to newspapers.[42a] Why not?

The question is relevant in reference to the application of the obscenity statute: Are our prosecutors ready to

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42a "No one would dare ask of a newspaper that it observe the same restraints that are constantly being demanded of * * * the comic book." Larrabee, The Cultural Context of Sex Censorship, 20 Law and Contemp. Problems (1955) 673, 679.

prosecute reputable newspaper publishers under that Act? I think not. I do not at all urge such prosecutions. I do suggest that the invalidity of that statute has not been vigorously challenged because it has not been applied to important persons like those publishers but, instead, has been enforced principally against relatively inconspicuous men like the defendant here.

Da Capo: Available data seem wholly insufficient to show that the obscenity statutes comes within any exception to the First Amendment.

I repeat that, because that statute is not restricted to obscene publications mailed for sale to minors, its validity should be tested in terms of the evil effects of adult reading of obscenity on adult conduct.[43] With the present lack of evidence that publications probably have such effects, how can the government demonstrate sufficiently that the statute is within the narrow exceptions to the scope of the First Amendment? One would think that the mere possibility of a causal relation to misconduct ought surely not be enough.

Even if Congress had made an express legislative finding of the probable evil influence, on adult conduct, of adult reading or seeing obscene publications, the courts would not be bound by that finding, if it were not justified in fact. See, e.g., *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, where the Court (per Holmes, *J.*) said of a statute (declaring the existence of an emergency) that "a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." And the Court there and elsewhere has held that the judiciary may use judicial notice in ascertaining the truth of such legislative declaration.[44]

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43 See *U. S.* v. *Levine,* 83 F. 2d 156, 157 (C. A. 2) to the effect that "what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach."

44 Cf. *United States* v. *Rumely,* 345 U. S. 41, 44.

If the obscenity statute is valid, why may Congress not validly provide punishment for mailing books which will provoke thoughts it considers undesirable about religion or politics?

If the statute is valid, then, considering the foregoing, it would seem that its validity must rest on this ground: Congress, by statute, may constitutionally provide punishment for the mailing of books evoking mere thoughts or feelings about sex, if Congress considers them socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially harmful deeds. If that be correct, it is hard to understand why, similarly, Congress may not constitutionally provide punishment for such distribution of books evoking mere thoughts or feelings, about religion or politics, which Congress considers socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially dangerous deeds.

2. The Judicial exception of the "classics"

As I have said, I have no doubt the jury could reasonably find, beyond a reasonable doubt, that many of the publications mailed by defendant were obscene within the current judicial definition of the term as explained by the trial judge in his charge to the jury. But so, too, are a multitude of recognized works of art found in public libraries. Compare, for instance, the books which are exhibits in this case with Montaigne's Essay on *Some Lines of Virgil* or with Chaucer. Or consider the many nude pictures which the defendant transmitted through the mails, and then turn to the reproductions in the articles on painting and sculpture in the Encyclopedia Britannica (14th edition):[45] Some of

45 See, *e.g.*, Vol. 17, p. 36, Plate 3, No. 4, reproducing Botticelli's "Birth of Venus"; p. 38, Plate VIII, No. 2, reproducing Titian's

the latter are indistinguishably "obscene." Yet these Encyclopedia volumes are readily accessible to everyone, young or old, and, without let or hindrance, are frequently mailed to all parts of the country. Catalogues, of famous art museums, almost equally accessible and also often mailed, contain reproductions of paintings and sculpture, by great masters, no less "obscene." [46]

To the argument that such books (and such reproductions of famous paintings and works of sculpture) fall within the statutory ban, the courts have answered that they are "classics,"—books of "literary distinction" or works which have "an accepted place in the arts," including, so this court has held, Ovid's Art of Love and Boccacio's Decameron.[47] There is a "curious dilemma" involved in this answer that the statute condemns "only books which are dull and without merit," that in no event will the statute be applied to the "classics," i.e., books "of literary distinction." [48] The courts have not explained how they escape that dilemma, but instead seem to have gone to sleep (although rather uncomfortably) on its horns.

This dilemma would seem to show up the basic constitutional flaw in the statute: No one can reconcile the cur-

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"Woman on a Couch"; Vol. 20, p. 202, Plate V, No. 8, reproducing Clodion's "Nymph and Satyr"; p. 204, Plate VI, reproducing Rodin's "The Kiss."

See *Parmelee* v. *U. S.*, 113 F. 2d 729, 734 and note 19 (App. D. C.).

46 See, *e.g.*, Masterpieces of Painting From The National Gallery of Art (Cairns and Walker ed. 1944) 68, 72, 114; Catalogue of Pictures Collected by Yale Alumni (1956) 3, 15, 55, 134, 137, 195.

47 See, *e.g.*, *U. S.* v. *Levine*, 83 F. 2d 156, 157 (C. A. 2); *U. S.* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (C. A. 2); *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2).

48 See *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2).

No one can argue with a straight face (1) that reading an obscene "classic" in a library has less harmful effects or (2) that, as the "classics" often are published in expensive volumes, they usually affect only persons who have large incomes, and that such persons' right to read is peculiarly privileged.

rently accepted test of obscenity with the immunity of such "classics" as e.g., Aristophanes' *Lysistratra,* .Chaucer's, *Canterbury Tales,* Rabelais', *Gargantua and Pantagruel,* Shakespeare's *Venus and Adonis,* Fielding's, *Tom Jones,* or Balzac's *Droll Stories.* For such "obscene" writings, just because of their great artistry and charm, will presumably have far greater influence on readers than dull inartistic writings.

It will not do to differentiate a "classic," published in the past, on the ground that it comported with the average moral attitudes at the time and place of its original publication. Often this was not true. It was not true, for instance, of Balzac's Droll Stories,[49] a "classic" now freely circulated by many public libraries, and which therefore must have been transported by mail (or in interstate commerce). More to the point, if the issue is whether a book meets the American common conscience of the present time, the question is how "average" Americans now regard the book, not how it was regarded when first published, here or abroad. Why should the age of an "obscene" book be relevant? After how many years—25 or 50 or 100—does such a writing qualify as a "classic"?

The truth is that the courts have excepted the "classics" from the federal obscenity statute, since otherwise most Americans would be deprived of access to many masterpieces of literature and the pictorial arts, and a statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the First Amendment.

This exception—nowhere to be found in the statute[50]—is a judge-made device invented to avoid that absurdity. The

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49 See discussion in *Roth* v. *Goldman,* 172 F. 2d at 797 (C. A. 2).

50 The importation statute relating to obscenity, 19 U. S. C. 1305, does make an explicit exception of the "so-called classics or books of recog-

fact that the judges have felt the necessity of seeking that avoidance, serves to suggest forcibly that the statute, in its attempt to control what our citizens may read and see, violates the First Amendment. For no one can rationally justify the judge-made exception. The contention would scarcely pass as rational that the "classics" will be read or seen solely by an intellectual or artistic elite; for, even ignoring the snobbish, undemocratic, nature of this contention, there is no evidence that that elite has a moral fortitude (an immunity from moral corruption) superior to that of the "masses." And if the exception, to make it rational, were taken as meaning that a contemporary book is exempt if it equates in "literary distinction" with the "classics," the result would be amazing: Judges would have to serve as literary critics; jurisprudence would merge with aesthetics; authors and publishers would consult the legal digests for legal-artistic precedents; we would some day have a Legal Restatement of the Canons of Literary Taste.

The exception of the "classics" is therefore irrational. Consequently, it would seem that we should interpret the statute rationally—i.e., without that exception. If, however, the exception, as an exception, is irrational, then it would appear that, to render the statute valid, the standard applied to the "classics" should be applied to all books and pictures. The result would be that, in order to be constitutional, the statute must be wholly inefficacious.

3. How censorship under the statute actually operates:

(a) Prosecutors, as censors, actually exercise prior restraint.

Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practi-

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nized and established literary * * * merit," but only if they are "imported for non-commercial purposes"; if so, the Secretary of the Treasury has discretion to admit them.

cally, fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive. If the definition of obscenity had a limited and fairly well known scope, that fear might deter restricted sorts of publications only. But on account of the extremely vague judicial definition of the obscene,[51] a person threatened with prosecution if he mails (or otherwise sends in interstate commerce)[52] almost any book which deals in an unconventional, unorthodox, manner with sex,[53] may well apprehend that, should the threat be carried out, he will be punished. As a result, each prosecutor becomes a literary censor (i.e., dictator) with immense unbridled power, a virtually uncontrolled discretion.[54] A statute would

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51 See *infra* for further discussion of that vagueness.

52 As to interstate transportation, see 18 U. S. C. Section 1462 which contains substantially the same provisions as 18 U. S. C. Section 1461.

53 See Kaplan, Obscenity as An Esthetic Category, 20 Law & Contemp. Problems (1955) 544, 551-552 as to "conventional obscenity," which he defines as "the quality of any work which attacks sexual patterns and practices. In essence, it is the presentation of a sexual heterodoxy, a rejection of accepted standards of sexual behavior. Zola, Ibsen and Shaw provide familiar examples. It surprises no one that the author of Nana also wrote J'Accuse; of Ghosts, An Enemy of the People; of Mrs. Warren's Profession, Saint Joan."

See also, Lockhart and McClure, Obscenity in the Courts, 20 Law & Contemp. Problems (1955) 586, 596-597 as to "ideological obscenity"; they note that the courts have generally refrained (at least explicitly) from basing their decisions on rulings that literally may be prescribed to guard against a change in accepted moral standards, "because any such ruling would fly squarely in the face of the very purpose for guaranteeing freedom of expression and would thus raise serious constitutional questions."

54 One court, at the suit of a publisher, enjoined a Chief of police—who went beyond threat of prosecution and ordered booksellers not to sell certain books—on the ground that the officer had exceeded his powers; *New American Library* v. *Allan*, 114 F. Supp. 823 (Ohio, D. C.). In another similar case, where a prosecutor was enjoined, the injunction order was much modified on appeal; *Bantam Book* v. *Melko*, 96 A. (2d) 47, modified 103 A. (2d) 256.

If, however, the prosecutor confines himself to a mere threat of prosecution, the traditional reluctance to restrain criminal prosecutions will

be invalid which gave the Postmaster General the power, without reference to any standard, to close the mails to any publication he happened to dislike.[55] Yet, a federal prosecutor, under the federal obscenity statute, approximates that position: Within wide limits, he can (on the advice of the Postmaster General or on no one's advice) exercise such a censorship by threat, without a trial, without any judicial supervision, capriciously and arbitrarily. Having no special qualifications for that task, nevertheless, he can, in large measure, determine at his will what those within his district may not read on sexual subjects.[56] In that way,

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very probably make it difficult to obtain such an injunction. *Sunshine Book Co.* v. *McCaffrey*, 112 N. Y. S. (2d) 476; see also 22 U. of Chicago L. Rev. (1954) 216; 68 Harv. L. Rev. (1955) 489.

This may be particularly true with respect to a federal prosecutor. See Jackson, The Federal Prosecutor, 24 J. of Am. Jud. Soc. (1940) 18: "The (federal) prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard."

55 See, e.g., *Joseph Burstyn Co. Inc.* v. *Wilson*, 343 U. S. 495.

56 It is, therefore, doubtful whether, as suggested by Emerson (*loc. cit.* at 656-660), a statute calling for punishment involves very much less arbitrary conduct and very much less censorship than one calling for punishment. In actual fact, by his threats of prosecution, the prosecutor does exercise prior restraint. Much, therefore, that Emerson says of prior restraint authorized by statute applies as well to censorship through a prosecutor's threats of prosecution: The "procedural safeguards built around criminal prosecution" (the stronger burden of proof, the stricter rules of evidence, the tighter procedure) are likewise absent. The "decision rests with a single functionary," an executive official, rather than with the courts. The prosecutor, by threats of prosecution, accomplishes prior restraint "behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal", and entailing the "chance of discrimination and other abuse." The "policies and

the statute brings about an actual prior restraint of free speech and free press which strikingly flouts the First Amendment.[57]

(b) Judges as censors.

When a prosecution is instituted and a trial begins, much censorship power passes to the trial judge: If he sits without a jury, he must decide whether a book is obscene. If the trial is by jury, then, if he thinks the book plainly not obscene, he directs a verdict for the accused or, after a verdict of guilt, enters a judgment of acquittal. How does the judge determine whether a book is obscene? Not by way of evidence introduced at the trial, but by way of some sort of judicial notice. Whence come the judicial notice data to inform him?

Those whose views most judges know best are other lawyers. Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Association or of alumni of our leading law schools,[58] tales are told fully as "obscene" as many of those distributed by men, like defendant, convicted for violation of the obscenity statute. Should not judges, then, set aside such convictions? If

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actions" of the prosecutor, in his censorship by threats of prosecution, are not "likely to be known or publicly debated; material and study and criticism" are not "readily available."

57 For startling instances of "prosecutor censorship" see Blanshard, The Right to Read (1955) 184-186, 190; 22 U. of Chicago L. Rev. (1954) 216.

58 See *Roth* v. *Goldman*, 172 F. 2d 788 at 796 (concurring opinion): "One thinks of the lyrics sung at many such gatherings by a certain respected and conservative member of the faculty of a great law-school which considers itself the most distinguished and which is the Alma Mater of many judges sitting on upper courts."

Aubrey's Lives, containing many "salacious" tales, delights some of our greatest judges.

Mr. Justice Holmes was a constant reader of "naughty French novels." See Bent, Justice W. O. Holmes (1932) 16, 134.

they do not, are they not somewhat arrogantly concluding that lawyers are an exempt elite, unharmed by what will harm the multitude of other Americans? If lawyers are not such an elite then, since, in spite of the "obscene" tales lawyers frequently tell one another, data are lacking that lawyers as a group become singularly unusually addicted to depraved sexual conduct, should not judges conclude that "obscenity" does not importantly contribute to such misconduct, and that therefore the statute is unconstitutional?

(c) Jurors as Censors.

If, in a jury case, the trial judge does not direct a verdict or enter a judgment of acquittal, the jury exercises the censorship power. Courts have said that a jury has a peculiar aptitude as a censor of obscenity, since, representing a cross-section of the community, it knows peculiarly well the average "common conscience" of the time. Yet no statistician would conceivably accept the views of a jury—twelve persons chosen at random—as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the "moral sentiments" of a generation ago, not of the present time.

Each jury verdict in an obscenity case has been sagaciously called "really a small bit of legislation ad hoc."[59] So each jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression? (I shall note, *infra*, the vast difference be-

59 *U. S.* v. *Levine*, 83 F. 2d 156, 157 (C. A. 2).

tween the applications by juries of the "reasonable man" standard and the "obscenity" standard.)

4. *The dangerously infectious nature of governmental censorship of books*

Governmental control of ideas or personal preferences is alien in a democracy. And the yearning to use governmental censorship of any kind is infectious. It may spread insidiously. Commencing with suppression of books as obscene, it is not unlikely to develop into official lust for the power of thought-control in the areas of religion, politics, and elsewhere. Milton observed that "licensing of books * * * necessarily pulls along with it so many other kinds of licensing." J. S. Mill noted that the "bounds of what may be called moral police" may easily extend "until it encroaches on the most unquestionably legitimate liberty of the individual." We should beware of a recrudescence of the undemocratic doctrine uttered in the 17th century by Berkeley, Governor of Virginia: "Thank God there are no free schools or preaching, for learning has brought disobedience into the world, and printing has divulged them. God keep us from both."

The people as self-guardians: censorship by public opinion, not by government

Plato, who detested democracy, proposed to banish all poets; and his rulers were to serve as "guardians" of the people, telling lies for the people's good, vigorously suppressing writings these guardians thought dangerous.[60]

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60 Plato furnished "an ideal blueprint for a totalitarian society": Chroust, Book Rev., 1 Natural Law Forum (1956) 135, 141. See also Popper, The Open Society and Its Enemies (19); Frank, Courts on Trial (1949) 146-147, 158, 350, 360, 405-406; Frank, Fate and Freedom (1949) 119, 319, note 25, 365, note 10; Frank, If Men Were Angels (1942) 192; Fite, The Platonic Legend (1934); Catlin, The Story of

Governmental guardianship is repugnant to the basic tenet of our democracy: According to our ideals, our adult citizens are self-guardians, to act as their own fathers, and thus become self-dependent.[61] When our governmental officials act towards our citizens on the thesis that "Papa knows best what's good for you," they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature.

So have sagacious men often insisted. Milton, in his Areopagitica, denounced such paternalism: "We censure them for a giddy, vicious and unguided people, in such sick and weak (a) state of faith and discretion as to be able to take down nothing but through the pipe of a licensor." "We both consider the people as our children," wrote Jefferson to Dupont de Nemours, "but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self-gover nent." Tocqueville sagely remarked: "No form or combination of social policy has yet been devised to make an energetic people of a community of pusillanimous and enfeebled citizens." "Man," warned Goethe, "is easily accustomed to slavery and learns quickly to be obedient when his freedom is taken from him." Said Carl Becker, "Self-government, and the spirit of freedom that sustains it, can be maintained only if the people have sufficient intelligence and honesty to maintain them with a minimum of legal compulsion. This heavy responsibility is the price of freedom."[62] The "great art," according to Milton, "lies to discern in what the law is to bid restraint

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the Political Philosophers (1939) 52, 58, 65-66; Kallen, Ethical Aspects of Censorship, in Protection of Public Morals Through Censorship (1953) 34, 53-54.

61 See Frank, Self Guardianship and Democracy, 16 Am. Scholar (1947) 265.

62 Becker, Freedom and Responsibility in the American Way of Life (1945) 42.

and punishment, and in what things persuasion only is to work." *So we come back, once more, to Jefferson's advice: The only completely democratic way to control publications is through non-governmental censorship by public opinion.*

5. The seeming paradox of the First Amendment.

Here we encounter an apparent paradox: The First Amendment, judicially enforced, curbs public opinion when translated into a statute which restricts freedom of expression (except that which will probably induce undesirable conduct). The paradox is unreal: *The Amendment ensures that public opinion—the "common conscience of the time"—shall not commit suicide through legislation which chokes off today the free expression of minority views which may become the majority public opinion of tomorrow.*

Private persons or groups, may validly try to influence public opinion.

The First Amendment obviously has nothing to do with the way persons or groups, not a part of government, influence public opinion as to what constitutes "decency" or "obscenity." The Catholic Church, for example, has a constitutional right to persuade or instruct its adherents not to read designated books or kinds of books.

6. The fine arts are within the First Amendment's protection.

"The framers of the First Amendment," writes Chafee, "must have had literature and art in mind, because our first national statement on the subject of 'freedom of the press,' the 1774 address of the Continental Congress to the inhabitants of Quebec, declared, 'The importance of this (freedom of the press) consists, beside the advancement of truth, science, morality and *arts* in general, in its diffusion of

liberal sentiments on the administration of government." [63] 165 years later, President Franklin Roosevelt said, "The arts cannot thrive except where men are free to be themselves and to be in charge of the discipline of their own energies and ardors. The conditions for democracy and for art are one and the same. What we call liberty in politics results in freedom of the arts." [64] The converse is also true.

In our industrial era when, perforce, economic pursuits must be, increasingly, governmentally regulated, it is especially important that the realm of art—the non-economic realm—should remain free, unregimented, the domain of free enterprise, of unhampered competition at its maximum.[65] An individual's taste is his own, private, concern. *De gustibus non disputandum* represents a valued democratic maxim.

Milton wrote: "For though a licenser should happen to be judicious more than the ordinary, yet his very office * * * enjoins him to let pass nothing but what is vulgarly received already." He asked, "What a fine conformity would it starch us all into? * * * We may fall * * * into a gross conformity stupidly * * * *" In 1859, J. S. Mill, in his essay on *Liberty*, maintained that conformity in taste is not a virtue but a vice. "The danger," he wrote, "is not the excess but the deficiency of personal impulses and preferences. By dint of not following their own nature (men) have no nature to follow * * * Individual spontaneity is entitled to free exercise * * * That so few men dare to be eccentric marks the chief danger of the time." Pressed by the demand for conformity, a people degenerate into "the deep slumber of a decided opinion," yield a "dull and torpid consent" to the ac-

63 Chafee, Government and Mass Communication (1947) 53.

64 Message at dedicating exercises of the New York Museum of Modern Art, May 8, 1939.

65 Frank, Fate and Freedom (1945) 194-202.

customed. "Mental despotism" ensues. For "whatever crushes individuality is despotism by whatever name it be called * * * It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating * * * In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them."

To vest a few fallible men—prosecutors, judges, jurors—with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a "moral police," is to make them despotic arbiters of literary products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled. An author's imagination may be cramped if he must write with one eye on prosecutors or juries; authors must cope with publishers who, fearful about the judgments of governmental censors, may refuse to accept the manuscripts of contemporary Shelleys or Mark Twains or Whitmans.[66]

Some few men stubbornly fight for the right to write or publish or distribute books which the great majority at the time consider loathsome. If we jail those few, the community may appear to have suffered nothing. The appear-

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66 Milton remarked that "not to count him fit to print his mind without a tutor or examiner, lest he should drop * * * something of corruption, is the greatest * * * indignity to a free and knowing spirit that can be put upon him."

ance is deceptive. For the conviction and punishment of these few will terrify writers who are more sensitive, less eager for a fight. What, as a result, they do not write might have been major literary contributions.[67] "Suppression," Spinoza said, "is paring down the state till it is too small to harbor men of talent."

7. *The motive or intention of the author, publisher or distributor cannot be the test.*

Some courts once held that the motive or intention of the author, painter, publisher or distributor constituted the test of obscenity. That test, the courts have abandoned: That a man who mails a book or picture believes it entirely "pure" is no defense if the court finds it obscene.[68] *U. S.* v. *One Book Entitled Ulysses,* 72 F. 2d 705, 708 (C. A. 2). Nor, conversely, will he be criminally liable for mailing a "pure" publication—Stevenson's Child's Garden of Verse or a simple photograph of the Washington Monument—he believes obscene. Most courts now look to the "objective" intention, which can only mean the effect on those who read the book or see the picture;[69] the motive of the mailer is irrelevant because it cannot affect that effect.

8. *Judge Bok's decision as to the causal relation to anti-social conduct.*

In *Commonwealth* v. *Gordon,* 66 Pa. D & C 101 (1949), Judge Bok said: "A book, however sexually impure and

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67 *Cf.* Chafee, The Blessings of Liberty (1956) 113.
Milton said that the "sense" of a great man may "to all posterity be lost . r the fearfulness, or the presumptuous rashness of a perfunctory licenser."

68 *Rosen* v. *U. S.,* 161 U. S. 29, 41-42; cf. *U. S.* v. *One Book Entitled Ulysses,* 72 F. 2d 705, 708 (C. A. 2).

69 *U. S.* v. *Levine,* 83 F. 2d 156 (C. A. 2); *Parmelee* v. *U. S.,* 113 F. 2d 729 (App. D. C.).

pornographic * * * cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurement into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience; too much can intervene and too many diversions take place * * * The only clear and present danger * * * that will satisfy * * * the Constitution * * * is the commission or the imminence of the commission of criminal behavior resulting from the reading of a book. Publication alone can have no such automatic effect." The constitutional operation of "the statute," Judge Bok continued, thus "rests on narrow ground * * * I hold that (the statute) may constitutionally be applied * * * only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question: the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt."

I confess that I incline to agree with Judge Bok's opinion. But I think it should be modified in a few respects: (a) Because of the Supreme Court's opinion in the *Dennis* case, 341 U. S. 494 (1951), decided since Judge Bok wrote, I would stress the element of probability in speaking of a "clear danger." (b) I think the danger need not be that of probably inducing behavior which has already been made criminal at common law or by statute, but rather of probably inducing any seriously anti-social conduct (i.e., conduct which, by statute, could validly be made a state or federal crime). (c) I think that the causal relation need not be between such anti-social conduct and a particular book

involved in the case on trial, but rather between such conduct and a book of the kind or type involved in the case.[70]

9. The void-for-vagueness argument

There is another reason for doubting the constitutionality of the obscenity statute. The exquisite vagueness of the word "obscenity" is apparent from the way the judicial definition of that word has kept shifting: Once (as we saw) the courts held a work obscene if it would probably stimulate improper thoughts or desires in abnormal persons; now most courts consider only the assumed impact on the thoughts or desires of the adult "normal" or average human being. A standard so difficult for our ablest judges to interpret is hardly one which has a "well-settled" meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, e.g., *International Harvester* v. *Kentucky*, 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.*, 244 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 885; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Champlin Refining Co.* v. *Commission*, 286 U. S. 120; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *N. Y.*, 333 U. S. 507; cf. *U. S.* v. *Cardiff*, 343 U. S. 169.

If we accept as correct the generally current judicial standard of obscenity—the "average conscience of the time"—that standard still remains markedly uncertain as a guide to judges or jurors—and therefore to a citizen who contemplates mailing a book or picture. To be sure, we trust juries to use their common sense in applying the "reasonable man" standard in prosecutions for criminal negligence (or the like); a man has to take his chances on jury verdicts in

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70 According to Judge Bok, an obscenity statute may be validly enforced when there is proof of a causal relation between a particular book and undesirable conduct. Almost surely, such proof cannot ever be adduced. In the instant case, the government did not attempt to prove it.

such a case, with no certainty that a jury will not convict him although another jury may acquit another man on the same evidence.[71] But that standard has nothing remotely resembling the looseness of the "obscenity" standard.

There is a stronger argument against the analogy of the "reasonable man" test: Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507; *Kunz* v. *New York*, 340 U. S. 290; *Burstyn Inc.* v. *Wilson*, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955). 194, 214-218.[72]

WATERMAN, *Circuit Judge*, concurring:

I concur with my colleagues in affirming the judgment below. I would dispose in one sentence of the claim advanced that the applicable statute, 18 U. S. C. A. §1461, is unconstitutional, for I believe the constitutionality of such legislation is so well settled that: "If the question is to be reopened the Supreme Court must open it. *Tyomies Publishing Company* v. *United States*, 6 Cir., 211 Fed. 385."—quoting Learned Hand, *C.J.*, in *U. S.* v. *Rebhuhn*, 2 Cir. 1940, 109 F. 2d 512 at 514, cert. denied 310 U. S. 629. I concur with Chief Judge Clark in his disposition of the remaining issues.

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71 *Nash* v. *U. S.*, 229 U. S. 373, 377; *U. S.* v. *Wurzbach*, 280 U. S. 396, 399; *U. S.* v. *Ragen*, 314 U. S. 513, 523.

72 In *U. S.* v. *Rebhuhun*, 109 F. 2d 512, 514 (C. A. 2), the court tersely rejected the contention that the obscenity statute is too vague, citing and relying on *Rosen* v. *U. S.*, 161 U. S. 29. But the *Rosen* case did not deal with that subject but merely with the sufficiency of the wording of an indictment under that statute.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of September, one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. HENRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL ROTH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Office - Supreme Court, U.S.
FILED
JAN 10 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 532

SAMUEL ROTH,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

DAVID VON G. ALBRECHT,
DAVID P. SIEGEL,
PETER BELSITO,
SIDNEY SILVERMAN,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term 1956

No. 582

SAMUEL ROTH,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

Opinion Below

The opinion of the Court of Appeals (Pet. App.) is now reported in 237 F. 2d 796.

Argument

A citizen of the United States is threatened in his liberty. He contends that the rights guaranteed to him under the First, Fourth, Fifth, Ninth and Tenth Amendments were violated. He claims that the Federal Obscenity Statute violated the freedom of the press, the due process clause of the Fifth Amendment, in that he was denied a fair trial and in that the statute was vague and indefinite;

that it violated the Tenth Amendment by reason of the fact that it improperly invaded the powers reserved to the states and to the people; and that it was a violation of the Fourth Amendment against searches without warrants, without proper cause.

1. The Government admits (p. 8 Brief in Opposition) that the petitioner's request for a writ cannot be considered frivolous and with justifiable frankness admits that dissenting opinions and labored discussions have frequently been put forward as grounds justifying a reappraisal of constitutional issues. A priori, questions raised by Judge Frank in his 50-page concurrence herein, Judge Bok, Judge Hand and Judge Woolsey indicate a difficulty which learned jurists have had with this question in the past.

The objection to have this Court review the question because it involves legislation of 75 years' standing was similarly overruled in *Winters v. New York*, 333 U. S. 507, where this Court struck down an enactment that had been part of the laws of New York for more than 60 years and was on the statute books of perhaps half the States. Because its application is so widespread is a basis on which the writ should be granted.

2. The court certainly has a right to inspect all the publications to see whether as a matter of law they are not obscene. It is the petitioner's contention that the publications were not obscene, nevertheless, however coarse, however obnoxious, however vulgar they may be to any segment of the population, they are not obscene as a matter of law.

In *U. S. v. Kennerly*, Judge Learned Hand pointed out that obscenity is the present critical point in the compromise between candor and shame at which the community may have arrived here and now. The problem is to find a possible compromise between opposing interests.

The petitioner contends that nothing objectionable is to be found in the text of the publications involved in this case when judged in their entirety.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. It is necessary to determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and we may not consider detached or separate portions in reaching a conclusion. It is necessary to judge the circulars, pictures and publications by present-day standards of the community; do they offend the common conscience of the community by present-day standards.

The book upon which the defendant was found guilty would have to have been read by the jury to determine whether it was obscene. This was not done or permitted.

It was physically impossible for the jury to have read the entire book and circulars. There was only one copy of each exhibit for the entire jury, and that this book (Government's Exhibit 10) consisting of 256 printed pages, contained over and beyond the passages complained of in the trial, sections on literary history, poetry, short stories, and the entire book "Twilight of the Nymphs" by Pierre Louys. The petitioner contends that the book, as a matter of law, was not obscene.

The Government had the burden of presenting affirmative proof of obscenity; that proof as to obscenity and the standards by which it can be recognized are available and presentable; indeed such proof was adduced by the defendant in his trial; that the Government's failure to adduce such proof placed upon the defendant the burden of proving his innocence.

3. There is no justice in gathering counts not related to each other and picking out some which are calculated to arouse and incite the jury instead of to explain the charge.

The indictment contained in all twenty-six counts. Three counts, Nos. 12, 25 and 26 were dismissed and the case was submitted to the jury on twenty-three counts. The defendant was found guilty only on four counts, Nos. 10, 13, 17 and 24.

The Government called in all some twenty-three witnesses of whom only four, including a postal inspector and postmaster were heard as to the four counts on which the defendant was found guilty. Nineteen of the Government's witnesses testified as to other matters but their testimony played an important part in the summation and consideration by the jury. In addition to the witnesses the Government put in evidence some 35 exhibits which were read in whole or in part to the jury and had in fact an adverse cumulative effect upon the jury, although only seven of the exhibits were in any way related to the counts on which the defendant was found guilty.

4. There is nothing in this record whatsoever from beginning to end upon which the postal inspector or the Government can claim any *probable cause* as to violation of the postal laws by the defendant Roth; there was no *warrant* justifying the Government's action; there was no evidence or foundation laid for the Government's conduct; the application for relief under the Fourth and Fifth Amendments was timely and properly made; no bill of particulars had been granted to defendant; the indictment failed to set forth and give notice to the defendant the obscene matter referred to therein; and the defendant was *peremptorily* shut off in his application and denied his rights under the Fourth and Fifth Amendments of the United States Constitution and was denied *hearing* or *relief* by the *summary* and *peremptory* denial of the Judge.

The evidence obtained by the Post Office officials by forgery and trickery was obtained *prior* to any other evidence.

One of the safeguards around the right of search and seizure is the previous existence of probable cause. In the instant case this was supplied neither by the Government witnesses who obtained the evidence, nor by their knowledge of previous evidence of probable cause in the hands of others.

The law is established in *Heath v. United States*, 169 F. 2d 1007, 1010:

> "It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused."

In the absence of such foundation the motion to suppress the evidence should have been granted.

5. The use in cross-examination and in summation of the book "Aubrey Beardsley" by Haldane McFall, was unfair, prejudicial, inflammatory and incitative. It created an atmosphere of unfairness to the petitioner and on the purely hearsay evidence read from it, a man's liberty was lost.

No proof was ever introduced in evidence that the hearsay mentioned in this book was the *truth*. No other evidence was given in the case to show that *any of the facts* mentioned in this book about Beardsley were true.

The witness, Lorge, had never read the book. The defendant had not read the book. There was no evidence in

the record at all to show that he ever knew this book existed or ever read any of its contents.

There was not the slightest evidence in the case that the defendant knew that Under The Hill was another title for Venus and Tannhauser.

The use made of this book by the prosecutor in his cross-examinations and in his summation were highly improper, inflammatory, incitative and incompetent, but helped foul the atmosphere so that the defendant never had his day in court.

This plus the Prosecuting Attorney's inflammatory remarks denied the defendant a fair trial.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

David von G. Albrecht,
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Peter Belsito,
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Attorneys for Petitioner.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
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MAR 14 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 40-96) is reported at 237 F. 2d 796. The United States District Court for the Southern District of New York issued no opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 18, 1956 (R. 97).

By order of Mr. Justice HARLAN entered on October 9, 1956 the time for filing a petition for a writ of certiorari was extended to and including November 17, 1956 and the defendant was placed on bail of $5,000.00 (R. 98). 77 S. Ct. 17. The petition for a writ of certiorari was filed on No-

vember 16, 1956 and granted on January 14, 1957 as to the three questions considered in this brief (R. 98-99). 352 U. S. 964.

The jurisdiction of this Court rests in 28 U. S. C. §1254 (1).

Constitutional and Statutory Provisions Involved

1. First Amendment.

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

2. Fifth Amendment.

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

3. Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. 62 Stat. 768; 18 U. S. C. §1461 (derived from R.S. §3893, and originally passed as §148 of an Act of June 8, 1872, 17 Stat. 302). **"Mailing obscene or crime-inciting matter:**

> "Every obscene, lewd, lascivious or filthy book,

pamphlet, picture, papers, letter, writing, print, or other publication of an indecent character; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

"Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance, * * *

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

This section was further amended by an Act of June 28, 1955, 69 Stat. 183, but the indictment and the court's charge to the jury were based on the section as it stood before the 1955 amendment.

Questions Presented

"1. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech

and freedom of the press guarantees of the First Amendment?

"2. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?

"3. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?"

Statement of the Case

This prosecution originated in a multitudinous indictment of 26 counts which was found by a grand jury in the Southern District of New York in July 1955. It charged the defendant with wrongfully depositing for mailing and delivery certain matter alleged to be in violation of Title 18 U. S. C. §§2 and 1461, 62 Stat. 768, and a conspiracy count under §371, 62 Stat. 701.

The case came on for trial before District Judge John M. Cashin and a jury in January 1956. In the course of the trial counts 12 and 25 of the indictment were dismissed on motion of the defense counsel with the government's consent. Count 26, the conspiracy count, was dismissed on motion of the defense counsel after argument. The case went to the jury on January 12, 1956. They returned a verdict on that day finding the defendant guilty on but four counts, 10, 13, 17 and 24, and not guilty as to the remaining nineteen counts of the indictment.

The judgment of the court was rendered on February 7, 1956. The court imposed a maximum sentence of five years

and a fine of $5,000 on count 10 (the defendant to be committed until such fine be paid), and sentenced him to a like term on counts 13, 17 and 24, running concurrently with the sentence of five years on count 10, and fined the defendant-petitioner $1 each on counts 13, 17 and 24, which fines of $1, however, were remitted (R. 1-2).

The Court of Appeals for the Second Circuit affirmed the judgment of the court below, but it felt constrained to refuse to consider the claim of the unconstitutionality of 18 U. S. C. A. §1461 on the ground that any such claim, as to this statute, was one for this Court alone.

Chief Judge Clark in the course of his opinion took occasion to say that the trial judge in imposing sentence pointed out that the defendant had been convicted several times before under both state and federal law (R. 47). 237 F. 2d at 800. The petitioner contends that there was no basis in the trial record for this statement. He did not take the stand, so he did not give his side of the controversy. At the time of sentence, Judge Cashin did refer to the fact that defendant had been convicted on a number of occasions.

Petitioner claimed before this Court that his previous encounters with the law arose as a result of his publications. Those cases in which he was convicted involved the sale of *Ulysses* by James Joyce, a book which was subsequently held to be not obscene in *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (2d Cir. 1934), *affirming* 5 F. Supp. 182 (D. S. D. N. Y. 1933); the English version of Arthur Schnitzler's *Reigen*, a movie from which under the title *La Ronde*, was permitted circulation by this Court in *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S.

587 (1954); Sir Richard Burton's translation of *The Perfumed Garden*, a classic fourteenth century Arabic work; *American Anecdotes*, a volume which is now available to the public; a translation of *The Anaga Ranga*, a famous Hindu classic dealing with the art of love in the style of the Latin *Ovid*; and two stories by Boccaccio that can now be obtained at the New York Public Library and purchased in any book store. His other engagements with the law, in which he obtained dismissals, involved the publication of Benjamin Franklin's essay entitled *To a Young Man on How to Choose a Mistress; Celestine*, which is the English version of *The Diary of a Chambermaid* by Octave Mirbeau, and which the New York public library now has available on its bookshelves with an introduction by Jules Romaine; and *Beautiful Sinners of New York*. Petitioner has written for such newspapers and magazines as the *Nation, Harper's Weekly, The Daily Mail, The Jewish Chronicle of London, The Boston Transcript* and *The New York Herald*. He is the author of several books, among them *Europe*, published by Liveright; *Now And Forever*, published by Robert McBride Co.; and *A Study In Consciousness*, with an introduction by Sir Arthur Eddington, the great English philosopher and mathematician. Petitioner is also the editor of Voltaire's *Philosophical Dictionary*. He has long been an important figure in the defense of free press freedoms.

Summary of Argument

Obscenity laws to be valid under the sweeping prohibitions of the First Amendment, the due process clauses of the Fifth and Fourteenth Amendments, and the reserva-

tions of rights and powers to the states and to the people of the Ninth and Tenth Amendments, should exist only on a state level, and should be only civil not penal in nature. The Ninth and Tenth Amendments make plain that under our federal system the maintenance of order and decency is primarily a state function. Especially should this be true with reference to obscenity, which is definable, if at all, and punishable only by reference to local standards of decency and morality. There can be no federal power with respect to such a purely local offense. It is incompatible with basic notions of federal competence that a publication should be capable of violating the federal obscenity statute if prosecuted in Boston and not violating that same statute if prosecuted in New York City.

Federal obscenity statutes violate the prohibitions of the First Amendment. The framers of the First Amendment provided no exceptions whatever to its absolute proscriptions. Whatever qualifications have been judicially imposed on the absolute language of the First Amendment when speech approaches action which the Congress may regulate or prohibit, no such qualifications are permissible when the speech Congress prohibits or punishes is unrelated to action which is the express subject of federal power. The First Amendment, when read literally, or historically in conjunction with the Ninth and Tenth Amendments, is an unqualifiedly absolute bar to federal authority over utterances allegedly obscene as well as those allegedly libelous, defamatory, or slanderous, all of which are, in essence, breaches of the peace intended by these three Amendments together to be unexceptionally withdrawn from the federal government and exclusively reserved to the states.

But even if in these areas the First Amendment be read as subject to Justice Holmes' classic clear and present danger test, obscenity statutes do not fall within this narrow exception. For there is no reliable evidence that obscene publications or pictures have any appreciable effect on the conduct of human beings.

In an event, criminal obscenity statutes cannot meet the requirements of the due process clauses of the Fifth Amendment. An individual should be able to know with certainty whether he has committed a crime. But no one knows whether material is obscene until after a jury of the community has rendered its verdict. Such verdicts will vary with the time and place.

If there must be statutes dealing with obscenity, they should be not only on a state level but also contain only civil injunctive sanctions. And even such sanctions should not come into operation until *after* a local jury has rendered its verdict.

ARGUMENT

I.

The Federal Obscenity Statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, violates the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the states and to the people.

The founders of this country, out of an abundance of caution, expressly provided:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

We believe that when properly understood, the absoluteness of the language of the First Amendment is no mere hyperbole.

The full import of that absoluteness emerges only when the First Amendment is considered in conjunction with the Ninth and Tenth Amendments. For while the First Amendment is not read as an absolute when Congress restricts speech incidental to the exercise of an enumerated federal power [*American Communications Association* v. *Douds*, 339 U. S. 382 (1950)], different considerations obtain when the Congress restricts expression unrelated to an expressly delegated federal power and affecting matters cognizable by the states [*Gitlow* v. *New York*, 268 U. S. 652, 672 (1925); *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294 (1952)]. When the Congress undertakes, as it did by the federal obscenity statute, to punish expression as a breach of the peace or offensive to morality or decency, it lays claim to jurisdiction over matter the Constitution intended to reserve to the states and the people thereof—a reservation historically implemented by absolutely barring the federal government from an area in which that government was without delegated power.

The body of the Constitution as originally adopted had no reference to the freedoms of speech or press. In the convention of 1787 the delegates considered the advisability of incorporating a provision on the subject but decided to omit it as unnecessary:

> "Friday, September 14, Mr. Pinckney and Mr. Gerry moved to insert a declaration 'that the liberty of the press be inviolably preserved.'
>
> "Mr. Sherman: 'It is unnecessary. The power of Congress does not extend to the press.'

"On this motion it passed in the negative." *Elliott's Debates* 545 (1901).

Such diverse persons as Thomas Jefferson and Alexander Hamilton, who scarcely agreed on anything, did agree on this: that no power over the press or speech had been delegated to the federal government. Hamilton in arguing against the Bill of Rights said: "For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" *The Federalist* 631 (Hamilton ed. 1864).

Jefferson responded:

> "Very well, I agree with you that the power is not legitimately here and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as a common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it not among such powers, we ask for a declaratory amendment to the Constitution which shall put if beyond peradventure that it is not one of the powers granted to the National Government." As quoted in Hart, *Power of Government over Speech and Press*, 29 Yale L. J. 410, 412 (1920).

See also,

Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 714 (1938).

In order to remove all possibility of doubt that Congress had no power over the press, not even an implied one, the Ninth Amendment provided:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

and the Tenth Amendment added:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The federal government was one of enumerated powers. This did not include any power over speech or the press. That which the First Amendment absolutely barred to the federal government, the Ninth and Tenth Amendments reserved to the states and the people—the bar and reservation necessarily co-existing and complementing each other. Thus it was that "fighting words", libel, defamation, etc., were matter for state, not federal action from the beginning. Cf. *Beauharnais v. Illinois, supra,* at 290.

Mr. Justice Frankfurter, in his opening address at the conference on "Government Under Law" held on September 22, 23, and 24, 1955 under the auspices of the Harvard Law School, commemorating the two-hundredth anniversary of the birth of Chief Justice Marshall, pointed out:

> "Thus, the gravamen of the attack in the Virginia and Kentucky Resolutions against the Alien and Sedition Acts of 1798 was that they infringed on the rights of the states and were promotive of 'a general consolidated government.' It deserves to be recalled that even Jefferson attributed to the

> states the power which he denied to the federal government. 'Nor does the opinion of the unconstitutionality and consequent nullity of the law—the [Sedition Act],' he wrote to Abigail Adams, 'remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. * * * While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right to do so.' (I am indebted for the exact text of this letter, dated September 11, 1804, to the kindness of Professor Julian P. Boyd, in one of whose forthcoming volumes of 'The Papers of Thomas Jefferson' it will duly appear in its entirety.)" [*John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 225-226 (1955)].

Similarly, an expert in the history of the American Revolution observed that Jefferson's fellow Republicans in Congress, while opposing the Federalists' Sedition Act, "were not willing to leave the press entirely free; [they] * * * regarded the punishment of libels and seditious speech and writings as a province of the states rather than of the Federal government. Nathaniel Macon declared that 'the liberty of the press was sacred'—but he meant only as against the Federal government, not against the states. Indeed, as he added, 'the states have complete power on the subject'." Miller, *Crisis in Freedom*, 168-169 (1951).

The dissents of Justices Holmes and Brandeis in *Gitlow v. New York*, 268 U. S. 652 (1925), carefully distinguished between federal and local power over freedom of expression. Mr. Justice Holmes there indicated that the word

"liberty" as used in the Fourteenth Amendment perhaps "may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern the laws of the United States" (268 U. S. at 672). This concept was expanded in *Palko* v. *Connecticut*, 302 U. S. 319 (1937), and became the basis for the Court's decision in that case. Later, Justice Jackson perceptively wrote in *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294, 295 (1952):

> "As a limitation upon power to punish written or spoken words, Fourteenth Amendment 'liberty' in its context of state powers and functions have meant and should mean something quite different from 'freedom' in its context of federal powers and functions.
>
> * * * * *
>
> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms.
>
> "When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.
>
> "For these reasons I should not, unless clearly required, confirm to the Federal Government such latitudes as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power."

The failure of the Congress to adopt Madison's proposal that the Constitution be amended to provide that "No State shall violate the equal rights of conscience, or the freedom of the press * * *" [1 *Annals of the Congress of the United States* 435 (Gales comp. 1834); 1 *The Debates and Proceedings in the Congress of the United States*, 452 (Gales ed. 1834)] is significantly corroborative of Justice Jackson's analysis.

Moreover, it is generally acknowledged that under "our federal system the administration of criminal justice is predominantly committed to the care of the states." *Rochin* v. *California*, 342 U. S. 165, 168 (1952); see also *Jerome* v. *United States*, 318 U. S. 101, 104, 105 (1943); *Malinski* v. *New York*, 324 U. S. 401, 412, 413 (1945). Congress may define crimes "only as an appropriate means of carrying into execution its limited grant of legislative powers." *Rochin* v. *California*, *supra*. Accordingly, since "the United States has no criminal jurisdiction over offenses against order and good manners" [Chafee, *Free Speech in the United States* 150 (1941); Ernst & Seagle, *To the Pure* 69-70 (1928); Schroeder, "*Obscene*" *Literature and Constitutional Law*, 140-141 (1911)], punishment of expression as obscene for offending decency, morality, or the peace falls most uniquely within the category of those subjects intended to be reserved to the states or the people and absolutely barred to the federal competence. For the offense of obscenity, if any, is against the community and its standards, and it is the community which must find the wrong to have been committed; it is for this reason that the issue of obscenity is one of fact for the jury, the voice of the community. Grant & Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 36, 147 (1930).

It is precisely the predominant influence of the local community in the definition and determination of the offense of obscenity which places that offense outside the scope of federal power. What is the *national* community to which one is to look to define obscenity for *federal* purposes? There is none.

> "The insuperable obstacle is the size and diversity of our Federalism * * * a single federal law against obscene publications which is supposed to impose the same standards upon all the states controls the reading of New York and San Francisco, New Orleans and Boston. * * * Neither our racial nor religious alignments augur well for a federal control of the obscene * * *.
>
> "Apart from such racial and religious differences in fact, there is no uniform sense of the obscene. The federal postmasters have not even such slender moral clues for their guidance as state officials have in the enacted laws relating to the general protection of the public morals" Ernst & Seagle, *To the Pure*, 70-72 (1928).
>
> "* * * there is no consistency in the decisions with respect to the same type of material from one period to another, or from one locale to another" *Report of the Select Committee on Current Pornographic Material*, H. R. Rep. No. 2510, 82d Cong. 2d Sess. 34 (1952).

The fallacy in hypothesizing some national community homogeneous as to matters of decency and morality—which is the indispensable prerequisite for federal obscenity legislation—is no mere philosophical or abstract constitutional objection. In a very real and substantial way it impairs freedoms which must be left to the states. For

when the federal government prosecutes and punishes the mailing of a publication, the effect is to ban the mailing thereof in every state; *even those states and communities which would not deem the mail indecent or immoral or obscene.* However else "non-mailable" as used in the instant obscenity statute may be defined, it is clear that a publication found to be obscene under it by a jury anywhere in the United States would be treated as "non-mailable" everywhere in the United States.

Differences in the application of substantially identical standards by New York and Boston have been fully documented. Grant & Angoff, *Massachusetts and Censorship,* 10 B. U. L. Rev. 147, 151-152, 164-172 (1930); Alpert, "*Judicial Censorship of Obscene Literature*", 52 Harv. L. Rev. 40, 53 ff. (1938). In addition, the different states have vastly differing legislative and judicial provisions concerning divorce, adultery, and fornication [Ernst & Seagle, *To The Pure,* 72 (1928)]—important constituents in defining the morality of a community. Accordingly, unless the federal government undertakes to measure the mails by the standards of the most liberal community—a charge to which it will surely demur—the federal power over obscenity involves foreclosing to some communities mail and literature they would not consider objectionable.

Of course, if the instant obscenity statute does not have the effect of imposing the standards of one community upon every other community in the United States, it has the even more absurd effect of permitting different results in different states upon the same state of facts under a single federal statute. A publication found to violate it in Boston could be found not to violate it in New York City.

This would yield the astonishing result of importing the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), into the application of a federal statute. *Cf. United States* v. *Turley*, 25 U. S. L. Week 4162 (U. S. Feb. 25, 1957); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447 (1942); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). Such potential for diversity and disharmony in the enforcement of a federal obscenity statute is compelling evidence that obscenity is a proper subject for state not federal power.

Plainly, then, the absence of any national community, and the bewildering varieties of local communities, confirm the absence of any federal power over matters of obscenity, and confine that power to the states and to the people.

That power which the Ninth and Tenth Amendments vest in the states and the people and the First Amendment expressly takes from the Congress is not to be subsumed from the postal power contained in Art. I, §8, cl. 7 of the Constitution.* The originators of that power never intended it to be other than an innocuous grant of authority [Rogers, *Postal Power of Congress* 23 (1916); Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 Minn. L. Rev. 402 (1920)], so that while Congress may act to protect the physical integrity of the mail or of the instrumentalities for their transmission (see, *e.g.*, 18 U. S. C. §§1691-1733, 62 Stat. 776-785), Congress

* Since the instant obscenity statute is not confined to or, apparently, based upon mail travelling interstate or mail related to commerce, it is unnecessary to inquire into the extent to which federal power over obscene matter in interstate commerce is authorized by the commerce clause (Art. I, §8, cl. 3).

may not act to supervise the written content of that which passes through the mail. The job of the Post Office Department is that of carrying the mail not of censoring it. As Judge Arnold so aptly put it in the concluding paragraph of his opinion in *Esquire* v. *Walker*, 151 F. 2d 49, 55 (1945), *affirmed sub nom*; *Hannegan* v. *Esquire*, 327 U. S. 146 (1946):

> "We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds'."

The first proposal to restrict the use of the mails by printed matter because of its content came in 1835. In December of that year President Jackson proposed the passage of a law which would prohibit the use of the mails for "incendiary publications intended to instigate the slaves to insurrection". Cong. Globe, 24th Cong., 1st Sess. 10 (1835). Northern anti-slavery agitation had become violent and the dissemination of abolitionist literature from the north throughout the south had assumed dangerous proportions. Nevertheless the proposal was defeated, 25-19. Cong. Globe App., 24th Cong., 1st Sess. 442 (1836). It was defeated because the Senators, from the South as well as from the North, regarded legislation barring abolitionist literature from the mails as a violation of the freedom of the press guarantee of the First Amendment. The men who voted against President Jackson's proposal were men who understood the original meaning and purpose of the Bill of Rights. They were men who were already past

their early childhood when the first Ten Amendments were adopted.

Because of the grave constitutional questions involved in President Jackson's proposal the Senate referred the measure to a select committee headed by Senator John C. Calhoun from South Carolina, bitter foe of abolitionist activities and intensely zealous for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering. Cong. Globe, 24th Cong., 1st Sess. 36-37 (1835). Yet he took his place with his Northern colleagues to denounce the measure as violative of the freedom of the press guarantee of the First Amendment.

On February 4, 1836, the select committee chaired by Senator Calhoun reported:

> "The committee fully concur with the President * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it.
>
> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law * * *.
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads * * *. The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee refer to the amended article of the

> constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President * * *" S. Rep. 118, 24th Cong. 1st Sess. 1-3 (1836).

Senator Henry Clay, also from the South, as well as Senators John Davis and Daniel Webster, from New England joined in opposing President Jackson's proposal. They were sympathetic to the purposes of the measure, but they could not see their way clear to voting for it because of the prohibition of the First Amendment.

Senator Davis reminded his colleagues:

> "The liberty of the press was not like the other reserved rights, reserved by implication, but was reserved in express terms; it could not be touched in any manner." Cong. Globe, 24th Cong., 1st Sess. 299 (1836).

Senator Davis had this further comment, which is even more pertinent today than when it was uttered:

> "The public morals were said to be in danger; it was necessary to prevent licentiousness, tumult, and sedition; and the public good required that the licentiousness should be restrained. All these were the plausible pretences under which the freedom of the press had been violated in all ages * * *." Cong. Globe App., 24th Cong., 1st Sess. 439 (1836).

Senator Clay considered this bill "unconstitutional; and if not so; that it contained a principle of a most dangerous and alarming character * * * after much reflection he had

come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever * * * the bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief * * *." *Ibid.*

Finally Daniel Webster, whose influence on the early development of our constitutional principles was second only to that of Chief Justice Marshall, vehemently attacked the bill. He declared that the freedom of the press included "the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?" *Id.* at 437. Further: "Now against the objects of this bill he had not a word to say; but with constitutional lawyers there was a great difference between the object and the means to carry it into effect * * * Congress had not the power, drawn from the character of the paper, to decide whether it should be carried in the mail or not; for such decision would be a direct abridgment of the freedom of the press * * * he was shocked at the doctrine." *Id.* at 440.

This Court in an opinion by Justice Field reviewed these debates. *Ex parte Jackson*, 96 U. S. 727 (1878). Justice Field stated:

> "* * * In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would

> be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation." At 733-734.

For other accounts of this important incident in our history see 6 McMaster, *History of the People of the United States*, 288-291 (1883); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. Law Review 703, 717-723 (1938); Schroeder, *"Obscene" Literature and Constitutional Law*, 139-140 (1911).

Starting shortly after the defeat, for constitutional reasons, of President Jackson's proposal to prohibit abolitionist literature from the mails, the limits of the federal postal power, so forcefully and eloquently stated in the 1836 Senate debates, have been slowly and inexorably eroded by administrative action, by legislation, and by decision as the postal power came increasingly to be equated with some undefined federal police power; lotteries, contraception, prize fight films, frauds, etc., have been the subject of federal action under the postal clause. See Deutsch, *op. cit. supra* at 723 ff; Comment, *Federal Police Power Turns to the Postal Clause*, 5 Fordham L. Rev. 302, 305-310 (1936); Rogers, *The Extension of Federal Control Through the Regulations of the Mails*, 27 Harv. L. Rev. 27, 29-30 (1913); Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 Minn. L. Rev. 402, 404-405; Schroeder, *op. cit. supra* at 129-141, 232-236. But always necessarily reserved from these federal inroads were, and are "what might be called, somewhat elusively, purely local matters." Deutsch, *op. cit. supra* at 707; *Burton v. United States*, 202 U. S. 344, 371

(1906); *Ex parte Jackson, supra* at 732; *Pike* v. *Walker*, 121 F. 2d 37, 39, cert. denied, 314 U. S. 625 (1941). Such a minimal reservation must be acknowledged. Otherwise, federal power extends to libel,* defamation, matrimonial matters, contracts, realty, etc., etc., so long as the mails are employed in any connection, no matter how remote, with the wrong or the transaction. It can hardly be seriously contended that such is the magnitude of Congressional cognizance, especially in view of the history of the postal clause.

In *Ex parte Jackson, supra*, this Court further stated that the Fourth Amendment applied to the mails so as to protect sealed communications from unlawful searches and seizures. Justice Field writing for the Court said:

> "* * * No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." At 733.

This has remained the unquestioned law. But it is impossible to reconcile this principle with the premise that the postal power is plenary. If the exercise of the postal power is subject to the restraint of the Fourth Amendment

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* In *Beauharnais* v. *Illinois, supra* at 290, Justice Jackson observed:

> "While there has been a demand from officials sources for a resumption of criminal libel prosecution, it has not been acceded to. Thus, while the jeopardy of such federal prosecutions has never been removed by any decision of this Court, I should think the validity of a federal enactment such as this would be extremely doubtful, to say the least."

it must be equally subject to the restraints of the First, Ninth and Tenth Amendments. No distinction is possible. The instant federal obscenity statute should be held unconstitutional as improperly invading powers reserved to the states and to the people.

II.

The instant federal obscenity statute violates the freedom of speech and of the press guarantees of the First Amendment.

Entirely apart from the reservations of rights and powers of the Ninth and Tenth Amendments, the instant federal obscenity statute falls afoul of the freedom of speech and of the press guarantees of the First Amendment. Legislation affecting freedom of speech or of the press, to be valid, must fall within certain narrow exceptions. The words must be such as are likely to incite to a breach of the peace [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942)], or such as have a sufficient probability to result in the overthrow of the government by force and violence [*Dennis* v. *United States*, 341 U. S. 494 (1951)]. Federal obscenity statutes do not fall within any of the narrow exceptions which the decisions of this Court have established.

The federal obscenity statute involved in this case, derives from an act originally passed in 1872, 17 Stat. 302, more than three-quarters of a century ago, as a result of the efforts of that feverish Puritan, Anthony Comstock. By virtue of an intensive campaign in which he denounced opponents as lechers and defilers of youth and American

womanhood, he succeeded in urging his bill through a busy Congress on the final day of its session. See Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 65 (1938). However, unlike other frenetic legislation which became dead in letter as in spirit [see e.g., *United States* v. *Williams*, 341 U. S. 70 (1951)], this statute has not become a Victorian vestigial remainder, but has been actively and frequently enforced, recently amended (see 69 Stat. 183), and promised vigorous prosecution for the future. See *Report of the Select Committee on Current Pornographic Materials*, H. R. Rep. No. 2510, 82d Cong., 2d Sess. (1952).

Despite the vitality as well as antiquity of the federal obscenity statute, this Court has never squarely considered or directly passed on the constitutionality of this statute. As Circuit Judge Frank in his concurring opinion in the court below said:

> "True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved in recent years" (R. 51). 237 F. 2d at 803.

See also Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 301, 352-358 (1954); Cushman, *National Police Power under the Postal Clause of the Constitution*, 4 Minn. L. Rev. 402, 411

(1920); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 729 (1938).

This Court has decided cases involving obscenity statutes where the validity of the statute was not challenged [see, *e.g.*, *United States* v. *Alpers*, 338 U. S. 680 (1949)], and in dicta has commented favorably on such statutes [see, *e.g.*, *Winters* v. *New York*, 333 U. S. 507, 510 (1948); *Hannegan* v. *Esquire*, 327 U. S. 146, 158 (1946)], yet when the issue of the compatibility between a state obscenity statute and the First Amendment was precisely raised and argued, this Court in one instance was equally divided and wrote no opinion [*Doubleday* v. *New York*, 335 U. S. 848 (1948)] and in another unanimously held the statute unconstitutional when it made criminal the general sale or distribution of literature tending to "incite minors" [*Butler* v. *Michigan*, 25 U. S. L. Week 4165 (U. S. Feb. 25, 1957)]. And at the last term this Court held in a *per curiam* decision that a state obscenity statute relating to motion picture films was unconstitutional under the First and Fourteenth Amendments, saying simply: "Judgment reversed. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Superior Films* v. *Dept. of Education*, 346 U. S. 587." *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 282 P. 2d 412.

For nearly the first 130 years of the First Amendment's existence there were no important cases involving the freedoms which it guarantees. As Chief Justice Vinson pointed out in *Dennis* v. *United States*, 341 U. S. 494 (1951):

> "No important case involving free speech was decided by this Court prior to *Schenck* v. *United States*, 249 U. S. 47 (1919)." At 503.

It was not until the prosecutions resulting from World War I that the Court began to explore the implications of the constitutional guarantee for freedom of expression. And it was not until after the opinions of Chief Justice Hughes for the Court in *Stromberg* v. *California*, 283 U. S. 359, and *Near* v. *Minnesota*, 283 U. S. 697, in May and June 1931, that the First Amendment freedoms received their sturdiest development. If the reasoning in these and in the following decisions of this Court is applied to the federal obscenity statute in the instant case, then this statute must be held to be unconstitutional as violating the freedom of the press guarantee of the First Amendment. As Circuit Judge Frank stated in his concurring opinion in the Court below:

> "• • • I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years, relative to the First Amendment as applied to other kinds of legislation" (R. 49). 237 F. 2d at 802.

However, he went along with his colleagues on the ground that the invalidation of this statute was the business of this Court.

The framers of the Constitution and the first Ten Amendments were careful draftsmen. Had they intended any exceptions to what Justice Holmes in his dissent in *Abrams* v. *United States*, 250 U. S. 616, 631 (1919), characterized as the "sweeping command" of the First Amendment, they would have specified them. They did not do so.

Of course the framers had a contemporary factual situation in mind: they wished to repudiate the common law crime of seditious libel. In the words of Professor Chafee

"the framers of the First Amendment sought to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions". *Free Speech in the United States* 22 (1948).

The controversy over freedom of the press in that period involved a conflict between two views of government. According to one view the rulers were the superiors of the people, and could not be subjected to any censure that would tend to diminish their authority. The people could not make adverse criticism in newspapers or pamphlets, but only through their lawful representatives in parliament, who might be petitioned in an orderly manner. According to the second view the rulers were the servants of the people, who might therefore find fault with their servants and discuss questions of their punishment or dismissal as well as of governmental policy. Consequently, the words of Sir James Fitzjames Stephen about this second view have a vital application to American law: "To those who hold this view fully and carry it out to all its consequences there can be no such offense as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitement to such offenses, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal." 2 *History of the Criminal Law* 300 (1883).

Although the framers of the First Amendment had in mind a contemporary situation, their felicitous language looked ahead to the future. They provided no exceptions whatever to the sweeping prohibitions of the First Amendment. They intended none. There should be none. See

Meiklejohn, *Free Speech: And Its Relation to Self-Government*, chap. 2 (1948).

However, beginning with what Chief Justice Vinson in his opinion in *Dennis v. United States*, 341 U. S. 494, 503 (1951), described as Justice Holmes' "classic dictum" in *Schenck v. United States*, 249 U. S. 47 (1919), there is an exception for words which "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress had the right to prevent". At 52. Circuit Judge Frank in his concurring opinion in the Court below in the instant case suggested that in the light of this Court's opinion in the *Dennis* case he "would stress the element of probability in speaking of a 'clear danger'" (R. 94). 236 F. 2d at 826. In the *Dennis* case Chief Justice Vinson in applying the clear and present danger test adopted the interpretation of Chief Judge Learned Hand in the court below:

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (341 U. S. at 510, 183 F. 2d at 212.)

But the narrow exception provided by the clear and present danger test does not help the government in the instant case, for there is no reasonable probability that allegedly obscene publications or pictures have any appreciable effect on the conduct of men, women or children. At the time that the misguided Anthony Comstock obtained as one of the fruits of his labors, more than three-quarters of a century ago, the first version of the federal

obscenity statute here in question, no one gave the slightest thought to this problem.

It is often assumed today that so-called obscene publications or pictures will cause sexual delinquency. The truth of the matter is that we do not know. The Court of Appeals of the State of New York in a recent case which is now before this Court, *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, 155 N. Y. S. 2d 639, 134 N. E. 2d 461 (1956), *probable jurisdiction noted*, 352 U. S. 962 (1957), pointed out this fact:

> "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, *e.g.*, Jahoda and Staff of Research Center for Human Relations, New York University [1954], The impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)" (1 N. Y. 2d at 181n.3.)

Such evidence as there is tends to indicate that neither publications nor pictures have much if anything to do with sexual or juvenile delinquency. Reference may be made in this connection to two studies, one by the Bureau of Social Hygiene of New York City and the other by the American Youth Commission, on young people in Maryland. Both studies bear out the fact that the sex education of the young comes from other sources than publications. Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 72 (1938); Bell, *Youth Tell Their Story* (1938). The Bureau of Social Hygiene of New York City sent questionnaires to 10,000 college and normal school

women graduates, and 1,200 answers were received. Not one specified a "dirty" book as the source of sex information. Of the 409 replies in answer to the question as to what things were most stimulating sexually, the majority noted very simply, "man". The American Youth Commission for its study took Maryland as a typical state and interviewed 13,528 young people there. This study showed that the chief source of sex education for the youth of all ages and all religious groups was youth's contemporaries. Only 4% reported that they owed most to books.

A recent summary of studies on juvenile delinquency by professors Lockhart and McClure in *Obscenity In the Courts*, 20 Law & Contemp. Prob. 587, 596 (1955), contains these conclusions:

> "(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any read by the delinquents. This is, of course, consistent with their finding that delinquents read very

> little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

Circuit Judge Frank quoted these conclusions and covered the authorities on this subject in the appendix to his concurring opinion (R. 66-77). 237 F. 2d at 811-817. Judge Frank wrote to Dr. Marie Jahoda, whose work is referred to in the quoted footnote 3 from the opinion of the Court of Appeals of New York in *Brown* v. *Kingsley Books*, *supra*, and asked her to supply him with her own summary of this work. She did so and he quoted it in his concurring opinion. She told him:

> "In the vast research literature on the causes of juvenile delinquency there is no evidence to justify the assumption that reading about sexual matters

> or about violence leads to delinquent acts. * * * " (R. 74). 237 F. 2d at 815.

See also Sheldon and Eleanor Glueck, *Unraveling Juvenile Delinquency* (The Commonwealth Fund 1950); Kinsey, *Sexual Behavior in the Human Female* 669-672 (1953); St. John-Stevas, *Obscenity and the Law*, 195-202 (1956); Ramsey, *The Sex Information of Younger Boys*, 13 Jour. of Orthopsychiatry 347-352 (1943).

If one were to say to a modern medical psychologist that the publications juveniles read or the pictures they see cause juvenile delinquency, he would at least feel that the speaker did not know what he was talking about. If one were to ask this medical psychologist what, in his opinion, causes juvenile delinquency he could reply in one word, aggression.

In light of the recent decision of this Court in *Butler* v. *Michigan*, *supra*, still another consideration must be added in the application of the "clear and probable danger" test. As we read that decision of the Court, the government does not sufficiently sustain the constitutionality of the federal obscenity statute merely by argument, or even demonstration, that obscene matter may tend adversely to influence the morals of minors. Such a tendency does not authorize punishment for the general circulation and distribution of a publication. For otherwise, in the words of Mr. Justice Frankfurter, the "incidence" of such legislation would be "to reduce the adult population * * * to reading only what is fit for children." *Butler* v. *Michigan*, *supra* at 4166. Consequently in order to sustain the instant obscenity statute, the government has the burden of demonstrating that allegedly obscene literature seriously and

imminently causes wrongful action or conduct on the part of reasonably mature and intelligent adults. We know of no responsible contention to this effect, and we challenge the government to supply any. Accordingly, we consider that the decision of this Court in *Butler* v. *Michigan*, *supra*, makes even more obvious the invalidity of this statute. The Court should hold it to be unconstitutional on its face and as here applied as violating the freedom of the press guarantee of the First Amendment.

III.

The instant federal obscenity statute violates the due process clause of the Fifth Amendment.

The concept of obscenity is as protean as any we have. There is nothing constant about it except its changeability. It changes not only from group to group but also from person to person. It changes not only from nation to nation but also from city to city and from city to country. It changes not only from one decade to another but also from one hour to another and from court to court. As Fluegel commented in *The Psychology of Clothes*: "Even within a given circle of intimates, what is considered quite permissible on one occasion may, a few hours later, be regarded as veritably indecent." At 19 (International Psychoanalytic Library, No. 18, Dr. Ernest Jones ed. 1930). What was considered obscene ten years ago is not so today and what is considered obscene today will not be ten years hence. The obscenity statute in the instant case, as Judge Frank pointed out in his concurring opinion, is thus "exquisitely vague" (R. 51). 237 F. 2d at 803. The word ob-

scenity, as Judge Frank stated in the appendix to his concurring opinion, is one of "exquisite vagueness" (R. 95). 237 F. 2d at 826.

Accordingly, at the last term the Court held that the word "obscene" was not a sufficiently definite one, at least upon which to base a system of prior restraint. *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 282 P. 2d 412. That case involved the motion picture *The Moon Is Blue*. A Kansas statute set up a board of review for films, and provided that this board should disapprove of such films as were "cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals". The board of review saw the film twice. The first time it disapproved with this notation: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme". Thereafter the plaintiff sought injunctive relief and the board saw the film again. This time it placed its decision squarely on the word "obscene", saying: "* * * The Board has found that film to be obscene, indecent and immoral, and such as tends to debase or corrrupt morals * * *".

The Supreme Court of Kansas in sustaining the board of review quoted the dicta from *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); and *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, 505, 506 (1952) to the effect that there might be a First Amendment exception for that which was obscene. Nevertheless, this Court reversed in a *per curiam* decision.

The statute which the Court struck down in *Holmby Productions* was a civil as distinguished from a criminal one. But if the word "obscene" is not a sufficiently definite

one in a civil statute, even though what is involved is a question of prior restraint, then it is clearly not a sufficiently definite one upon which to base a criminal statute. As the Supreme Court pointed out many years ago through Chief Justice Waite in *United States* v. *Reese*, 92 U. S. 214, 220 (1876): "Every man should be able to know with certainty when he is committing a crime."

Many times under the due process clause this Court has invalidated statutes which did not provide reasonably ascertainable standards of guilt. Two recent examples are *Winters* v. *New York*, 333 U. S. 507 (1948), and *Musser* v. *Utah*, 333 U. S. 95 (1948).

In the *Winters* case this Court held invalid a penal law of the State of New York which prohibited publications that massed in their pages stories of bloodshed and lust, saying:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' Pierce v. United States, 314 U. S. 306, 311; Cantwell v. State of Connecticut, 310 U. S. 296. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." At 515.

In the *Musser* case the defendants preached polygamy and were convicted under a state statute which made it an offense to conspire to commit any action "injurious to public morals." There was a conviction which the Supreme Court of Utah affirmed, but this Court vacated the judgment and sent the case back for further proceedings not

inconsistent with the Court's opinion. The Court, speaking through Justice Jackson, said:

> "* * * Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, United States v. Cohen Grocery Co., 255 U. S. 81 * * *." At 97.

See also *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 (1932); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Cline* v. *Frank Dairy Co.*, 274 U. S. 445 (1927); *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (1914); *Collins* v. *Kentucky*, 234 U. S. 634 (1914). *Cf. United States* v. *Cardiff*, 344 U. S. 174 (1952).

We submit that Circuit Judge Frank was right in his concurring opinion when he stated that the federal obscenity statute does not have "a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or picture," citing cases (R. 95). 237 F. 2d at 826.

Reference may further be made to additional movie censorship cases where the Court struck down statutes on the ground that the language in them was not sufficiently definite. *Superior Films Inc.* v. *Ohio*, 346 U. S. 587 (1954) (Ohio statute involving the use of the words "immoral, educational, or amusing and harmless character"); *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954) (New York Statute using the word "immoral");

Gelling v. *Texas*, 343 U. S. 960 (1952) (Texas statute using the words "sexually immoral"); *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495 (1952) (New York statute using the word "sacrilegious").

Under the decided cases of this Court the words "obscene" (*Holmby Productions*), "immoral" (*Commercial Pictures*), "moral" (*Superior Films*), "sexually immoral" (*Gelling*), "sacrilegious" (*Burstyn*), "massed stories of bloodshed and lust" (*Winters*), "injurious to public morals" (*Musser*), are none of them sufficiently definite. Obscenity is capable of definition only by exhausting the list of equally undefinable synonyms. "All courts agree that the definition of obscenity is limited to the exhaustion of its synonyms; the disagreement arises in the arrangement of them." Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 147, 155 (1930).

If obscenity is a term soft in the center, fuzzy at the edges, and elastic throughout when the subject of local law, it is confusion hopelessly confounded when the subject of federal law. At least in a local law the term has reference to some community standards of decency and morality. Such definition may have some discernible signification in a relatively homogeneous community such as a town, county, city or even some states. But it is wholly impossible of intelligible or objective construction when the community is the nation. What is obscene in Greenwich, Connecticut may not be obscene in Greenwich Village, New York; nudity means one thing to a naked boy on a sharecrop farm and another to a choir boy; a picture of a woman with her breasts exposed causes one reaction to the Florida resident who every day sees women exposed

in the sun for tanning and another to a prim Bostonian. Perhaps some extreme polar connotations of the word "obscene" may be found which will cover every community; but every word—including admittedly vague words, such as "good" or "bad"—has such semantic qualities. For purposes of the Fifth Amendment the word "obscene" in 18 U. S. C. §1461, as applied, is fatally vague because the penumbra between what is "obscene" and "not obscene" everywhere in the United States is as vast as the nation itself; such vagueness means that 18 U. S. C. §1461 contains no objective standards.

Nor is it any answer to this argument to say that a jury in each case decides what is obscene. A person still does not know in advance whether he is committing a crime. As Circuit Judge Frank pointed out in the appendix to his concurring opinion in the court below:

> "Each jury verdict in an obscenity case has been sagaciously called 'really a small bit of legislation ad hoc.' [United States v. Levine, 83 F. 2d 156, 157 (2d Cir. 1936)]. So each jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?" (R. 88). 237 F. 2d at 822-823.

Not only must statutes, particularly those with criminal sanctions, provide reasonably ascertainable standards of guilt in order to meet the requirements of due process,

but, further, if such statutes involve First Amendment rights the standards which they prescribe must be particularly clear and precise. Again as Circuit Judge Frank pointed out in the appendix to his concurring opinion:

> "Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See Stromberg v. California, 283 U. S. 359; Herndon v. Lowry, 301 U. S. 242; Winters v. New York, 333 U. S. 507; Kunz v. New York, 340 U. S. 290; Burstyn Inc. v. Wilson, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218" (R. 96). 237 F. 2d at 827.

For additional authorities to the same effect see *Musser* v. *Utah*, 333 U. S. 95 (1948); *United States* v. *C.I.O.*, 335 U. S. 106, 150-153 (1948); Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

Since the federal obscenity statute does not provide a reasonably ascertainable standard of guilt, the Court should hold it invalid as violating the due process clause of the Fifth Amendment. Particularly should the Court reach this result because of two additional considerations: this statute involves criminal sanctions;* and it applies to an area also under the protection of the First Amendment guarantee of freedom of the press.

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* In the instant case petitioner received the severe punishment of a sentence of five years and a fine of $5000. By way of contrast, in most state court proceedings the punishment is much less. In *Butler* v. *Michigan*, 25 U. S. L. Week 4165 (U. S. Feb. 25, 1957), for instance, the punishment was a fine of $100.

CONCLUSION

We therefore request that the judgment of the Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Counter-Statement Concerning Scope of Review

The government suggests: "Under the limited grant of certiorari, it is to be taken as given that the material to which the statute was construed to apply is likely to corrupt the morals of the average member of the community" (Br. 96). We challenge this statement. Although the Court limited review to the three questions considered in our brief, the court did not limit the consideration of those questions. The review in this case is nothing less than the constitutionality of the federal obscenity statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, under the First.

Fifth, Ninth and Tenth Amendments. Such review includes consideration of the constitutionality of this statute not only on its face but also as applied. Indeed, the government concedes this at one point (Br. 16). Such a consideration of this statute involves questions of the substantive evil which Congress sought to prevent and whether there was a reasonable probability that petitioner's publications would bring about this evil. If there was no proof as to any substantive evil and no proof that petitioner's publications would probably bring about this substantive evil then the case should never have gone to the jury.

ARGUMENT

I.

18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, Is Not Confined, Nor Does It Even Refer, to "Hard-Core" Pornography. Concededly, the Matter for Which Petitioner Was Convicted Is Not of That Quality. Accordingly, the Government's Argument Is Almost Entirely Devoted to the Defense of a Conviction Based on a Statute and a State of Facts Not Here Present.

Briefly stated, the government contends no more than that a federal criminal statute aimed at "hard-core" pornography carried in the United States mails is valid. The current state of our law, mores and thought concerning freedom of expression would allow little more room even for the most ardent advocate. The emphasis upon "hard-core" pornography is an admission that a federal criminal statute dealing with something substantially less virulent

would be incapable of constitutional justification in the face of the realistic material which is now accepted in literature and the other arts as regular fare.

Unfortunately for the government, however, the statute it defends is not authored by the able and enlightened writers of its brief to this Court, but by Anthony Comstock.[1] Not surprisingly, then, 18 U. S. C. §1461 makes no reference to pornography, "hard-core" of otherwise. Instead the statute deals with "obscene, lewd, lascivious, or filthy" matter. By its terms, at least, 18 U. S. C. §1461 covers far more ground than the government is prepared to defend.

If legislative intent be probed to supply that limitation which the statute does not, it must be immediately recalled that 18 U. S. C. §1461 is our legacy from Comstock. None would dare to suggest that Comstock, who drafted and secured the passage of 18 U. S. C. §1461, intended to confine it to "hard-core" pornography. Indeed, Comstock would probably disown and denounce the government's efforts to revise by construction his section. The government's current reading of 18 U. S. C. §1461 warrants the reminder that:

> ". . . no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature" [Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947)].

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[1] We seriously doubt whether material such as appears at p. 63 of the government's brief would have been deemed consonant with the spirit of 18 U.S.C. §1461 by Comstock.

Nor do the facts in this case bring 18 U. S. C. §1461, as here applied, within the field of "hard-core" pornography upon which the government wishes to base its effort. The government admits petitioner's publications are in the "borderline entertainment area" (Br. 36) and do not contain that blatant, commercial, "black-market" pornography (Br. 37) which is said to be the principal objective of those enforcing 18 U. S. C. §1461. That 90% of the offenders of 18 U. S. C. §1461 are of the "hard-core" pornography[2] variety is of little solace to petitioner, who is under the harsh sentence of five years plus a fine of $5,000.00, though he did not deal in such matter, and of no aid to this Court confronted with a statute not confined to pornography in a case where no pornography was purveyed.[3]

The government, inverting the old Blackstone dictum, would sustain the statute and the conviction here on the theory that better one man innocent of dealing in pornography be convicted than nine men guilty thereof escape. It is sufficient for the government that petitioner, in its

---

[2] This figure is claimed by the government in its brief here but not substantiated in the record or any other published source referred to in the brief.

The government also points out that a large number of defendants indicted under 18 U.S.C. §1461 pleaded guilty. (Br. 34 n.22). This observation has no significance: most defendants in federal criminal cases plead either guilty or *nolo contendere*. See Rogge, *Compelling The Testimony of Political Deviants*; 55 Mich. L. Rev. 375, 405-406 (1957).

[3] In yet another respect the government has directed its argument to an issue not here presented. Thus the government suggests that petitioner's circulars and advertisements invaded the privacy and offended the sensibilities of recipients who did not order or desire to receive that matter (Br. 8, 9-10, 60-63). Of course, 18 U.S.C. §1461 does not expressly refer, nor is it confined, to unsolicited literature.

view, comes with the aura of the "hard-core" of pornography. In this manner the government vividly confirms the dangers of judicial legislation, particularly in the area of criminal penalties for First Amendment activities. In that area the rule is that the statute must be narrowly and directly confined to the evil as to which legislative competency obtains. (See authorities at pp. 39-40 of Pet. Br.) The government can constitutionally justify 18 U. S. C. §1461 only by the flagrant violation of that rule, *i.e.*, by urging that 18 U. S. C. §1461 covers the aural extensions of "hard-core" pornography, for only by such argument can the government hope to bring this case within the only area even capable of defense.

Almost in its entirety, the reasoning of the government's brief is based upon the consequences of exigency and power flowing from the transmission of pornography through the mails. Even on its chosen premise we think the government wrong. But, even more importantly at this point, at the outset we must, almost forcibly, remove this case from the posture in which it has been posed by the government in 125 pages of brief-writing. Neither the statute nor the facts deal with pornography. As a consequence, we start here by re-posing the case in terms of the questions presented as to which certiorari was granted (352 U. S. 964): does the federal *obscenity* statute, 18 U. S. C. §1461, violate the First, Fifth, Ninth and Tenth Amendments? While the government has submitted an able and even eloquent brief to sustain some future act dealing only with "hard-core" pornography, it has failed almost completely to direct any argument to the questions presented by the writ.

II.

18 U. S. C. §1461 Is In Violation of the First, Ninth and Tenth Amendments.

We argued in our main brief that under the First Amendment expression is free, particularly where the only interest threatened by expression is the morality or peace of a locality which is exclusively the subject of local jurisdiction under the Ninth and Tenth Amendments. We recognized, of course, that where expression is tantamount to action cognizable by federal power, then the power over the action extends to the expression. In this view expression remains free, only action or expression to the extent that it is equivalent to action is the subject of governmental restraint. Differences exist as to how close speech must be to action before it can be treated as action: the "reasonable tendency" [*Gitlow* v. *New York*, 268 U. S. 652 (1925)] clear and present danger [*Schenck* v. *United States*, 249 U. S. 47, 52 (1919)] and clear and probable danger [*Dennis* v. *United States*, 341 U. S. 494 (1951)] tests are among those which have been employed by this Court. But none of these tests denies that the First Amendment guarantees expression freedom from federal power; the only inquiry in the cases is whether the expression is sufficiently closely related to action amenable to governmental power.

Since 18 U. S. C. §1461 punishes expression without regard to its relation to action subject to federal power, the government must and does contend that some expression is historically and inherently entitled to little or no First Amendment protection irrespective of whether the expres-

sion is related to or was productive of action within the scope of the Congress. We think the government to be in error on both scores.

A.

The Framers of the Federal Bill of Rights Intended No Exception for Obscenity from the First Amendment's Sweeping Command That "Congress Shall Make No Law."

There was no established common law crime of obscenity at the time of the adoption of the First Amendment. As late as 1795 the great Hawkins remarked in *2 Pleas of the Crown*:

> "* * * a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable as I have heard agreed in the Court of King's Bench." At 130.

Alpert, in *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938) wrote that until the end of the 18th century there was no definition of the term obscenity and continued

> "There is no basis of identification * * * there is little more than the ability to smell it." At 47.

More recently Professor Walter Gellhorn in his book *Individual Freedom and Governmental Restraints* (1956) stated that "the English obscenity law dates only from 1857, in the Victorian era, and the United States statutory framework began to be built only in 1873, when Congress was overcome by Anthony Comstock". At 99.

The first reported case in this country on obscenity was decided in 1815. *Commonwealth* v. *Sharpless*, 2 S. & R.

(Pa.) 91. See also Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 36, 52 (1930); Note, 52 Mich. L. Rev. 575, 576 (1954). And it was not until 1821 that state legislation on the subject began to occur. Lasswell, *Censorship*, 3 Encyc. Soc. Sci. 290, 293 (1944 ed.).[4]

The historical evidence offered by the government is not to the contrary. Restraints by Washington on profanity in the army (Br. 21-22) we may put aside if for no other reason than that the discipline required for soldiers is no precedent for the treatment of civilians in a democracy. Moreover, the early state action dealing with profanity, or even blasphemy in public, recited by the government (Br. 22-25), is not relevant to the problem of obscenity any more than legislation against indecent exposure in public is relevant to alleged obscenity in publications which must be purchased to be seen.

Moreover, even in those cases where speech constituted an offense, as, in libel, the framers intended no exception under the First Amendment to the ban of federal power. Both James Madison, generally known as the father of the Constitution and the principal draftsman of the first Ten Amendments, and Thomas Jefferson specifically said so. This was the basis for their objection to the Sedition Act of 1798. Madison demolished the two arguments offered in support of the Sedition Act of 1798: that Congress had power to punish crimes under the common law of England, and that the First Amendment nevertheless allowed Congress to punish the licentiousness of the press.

[4] The Act of 1711 of Massachusetts Bay Colony, to which the government refers (Br. 24), when carefully read is seen to relate to blasphemy and not to obscenity.

He took the position that the federal government was without any authority whatsoever for shielding its officers against libelous attack. If federal officials were libeled they could sue in the same state courts as their fellow citizens. In 1799 Madison in his *Address of the General Assembly to the People of the Common Wealth of Virginia* on the Virginia Resolutions of 1798 argued:

> "* * * Every libellous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers, or private citizens. Nor is there any distinction in the Constitution empowering Congress exclusively to punish calumny directed against an officer of the General Government; so that a construction assuming the power of protecting the reputation of a citizen officer will extend to the case of any other citizen, and open to Congress a right of legislation in every conceivable case which can arise between individuals." 4 *The Writings of James Madison*, 332, 334 (Hunt ed. 1906).

In the course of his presentation Madison quoted the reply of Charles Cotesworth Pinckney, Elbridge Gerry and John Marshall, who later became Chief Justice of this Court, to the French Minister Talleyrand. Pinckney, Gerry and Marshall constituted the first of two missions which President John Adams sent to France. They wrote to Talleyrand:

> "The genius of the Constitution, and the opinion of the United States, cannot be overruled by those who administer the Government. Among those

> principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is alive; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press they have never yet been devised in America.* No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye, or to punish such calumnies and invectives otherwise than by a legal prosecution in courts which are alike open to all who consider themseves as injured." 6 *Id.* at 336.

At the end of the year Madison prepared his *Report on the Resolutions of 1798*. Here he elaborated still more:

> * * * for, if the power to *suppress insurrections* includes a power to *punish libels*, or if the power to *punish* includes a power to *prevent*, by all the means that may have that *tendency*, such is the relation and influence among the most remote subjects of legislation, that a power over a very few would carry with it the power over all. And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or

exercised under the name of unlimited means of carrying into execution limited powers.

* * *

* * * Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. Nor can the wisdom of this policy be doubted by any who reflect that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the rights which conducted them to the ranks of a free and independent nation and which have improved their political system into a shape so auspicious to their happiness? * * * the article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress of any power whatever on the subject * * *

Is, then, the Federal Government it will be asked, destitute of every authority for restraining the licentiousness of the press and for shielding itself against the libellous attacks which may be made on those who administer it?

The Constitution alone can answer this question. If no such power be expressly delegated, and if it be not both necessary and proper to carry into execution an express power—above all, if it be expressly forbidden, by a declaratory amendment to the Constitution—the answer must be that the Federal Government is destitute of all such authority.

> The peculiar magnitude of some of the powers necessarily committed to the Federal Government; the peculiar duration required for the functions of some of its departments; the peculiar distance of the seat of its proceedings from the great body of its constituents; and the peculiar difficulty of circulating an adequate knowledge of them through any other channel; will not these considerations, some or other of which produce other exceptions from the powers of ordinary governments altogether, account for the policy of binding the hand of the Federal Government from touching the channel which alone can give efficacy to its responsibility to its constituents, and of leaving those who administer it to a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties?" 6 *The Writing of James Madison*, 371, 389-393 (Hunt ed. 1906).

Jefferson in his letter of September 11, 1804 to Mrs. John (Abigail) Adams, the wife of his political opponent in the presidential campaign of 1800, and in his second inaugural address took the same position. 10 *The Works of Thomas Jefferson*, 89-90, 133-135 (Fed. ed. 1905); 8 *The Writings of Thomas Jefferson*, 311 (Ford ed. 1897); 4 *Memoir, Correspondence, and Miscellanies from the Papers of Thomas Jefferson*, 27 (Randolph ed. 1829). In his second inaugural Jefferson said that the abuses and licentiousness of the press were to be "corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation".

Other leaders among the founding fathers of this country took the same position. Among them were John Taylor of Caroline, Nathaniel Macon, Edward and William Liv-

ingston, and Albert Gallatin. See Smith, *Freedom's Fetters*, 131-155 (1956); Miller, *Crisis in Freedom*, 168-169 (1951); Schachner, *Founding Fathers*, 447-468 (1954). See also, Brandt, *James Madison Father of the Constitution*, 452-471 (1950). Taylor of Caroline gave an apt description of the Sedition Act of 1798 in his *An Inquiry Into the Principles And Policy of the Government of the United States* (New Haven, 1950). He said:

> "The design of substituting political for religious heresy, is visible in the visage of sedition laws. A civil priesthood or government, hunting after political heresy, is an humble imitator of the inquisition, which fines, imprisons, tortures and murders, sometimes mind, at others, body. It affects the same piety, feigned by priestcraft at the burning of an heretick; and its party supplies such exultations, as those exhibited at an auto da fe, by a populace." At 437.

The Sedition Act of 1798 expired by its own terms on March 3, 1801. The following day Jefferson said in his first inaugural: "If there be any among us who wish to to dissolve this Union, or to change its Republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." 9 *The Works of Thomas Jefferson*, 195-196 (Fed. ed. 1905).

No attack on the validity of the Sedition Act of 1798 reached this Court, but the better opinion today regards it as a violation of the First Amendment. See the dissenting opinion of Justice HOLMES in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) ("I wholly disagree with the argument of the government that the 1st Amendment left

the common law as to seditious libel in force"), an opinion in which Justice BRANDEIS concurred; and the dissenting opinion of Justice JACKSON in *Beauharnais* v. *People*, 343 U. S. 250, 288 (1952). Justice Jackson commented:

> "* * * I think today's better opinion regards the enactment as a breach of the First Amendment and certainly Mr. Justice Holmes and Mr. Justice Brandeis though so."

President Woodrow Wilson in his 3 *History of the American People* declared that the Sedition Act of 1798 "cut perilously near the root of freedom of speech and of the press." At 153.

Thus on the first two great occasions when the question arose of the federal government punishing speech, namely at the time of the Sedition Act of 1798 and again in 1835-36 when President Jackson called for a law prohibiting the use of the mails for "incendiary publications" (Pet. Br. 18-21), the founders of this country, and their first successors, unequivocally took the position that such attempts violated the First Amendment. They had no doubt. The First Amendment meant just what it said: it absolutely prohibited Congress from making any law abridging freedom of speech or of the press.

B.

This Court Should Decline the Novel Role, Offered By the Government, to Develop a Catalogue of Values By Which to Measure the Respective Rights of Expressions to the Protection of the First Amendment.

What history denies to the government is not to be granted by the undiscriminating transportation of a dis-

torted version of Dean Pound's theory of balancing of interests into the realm of the First Amendment.

In order to prove that obscene writings are expressions entitled to little or no protection by the First Amendment, the government undertakes to suggest a catalogue of First Amendment values for various types of expression. What Bentham tried so valiantly but futilely to do for philosophy and Spinoza for ethics, the Solicitor General essays for the First Amendment. If this Court ever had any doubts that First Amendment expression could not be fragmented and then have varying values placed on its various forms like price-tags on cuts of meat, the chart on p. 29 of the government's brief should end those doubts. Before this Court assumes the impossible role, gratuitously offered by the government, as the appraiser of how much First Amendment currency shall be allowed each of the infinite forms expression can take, we would urge the position, which the government correctly characterizes as "simple and straightforward" (Br. 18), that expression unrelated to action subject to federal power is wholly and unexceptionally free under the First Amendment.

C.

The Government Has the Burden of Showing Both What the Substantive Evil Was and That the Danger of It Was So Clear and Immediate or Probable as to Justify Suppression of the Publications in Question.

Under the test in *Dennis* v. *United States*, 341 U.S. 494 (1951), and *Schenck* v. *United States*, 249 U.S. 47 (1919), there must be both a substantive evil and a probability that the publications in question will bring about that evil.

The government assumes that the publications in question, without more, established both parts: As a matter of fact they establish neither.

At the outset there is a fundamental difference between the instant case and the *Dennis* case in that in the *Dennis* case there was at least a statute, the Smith Act, which made the advocacy of the overthrow of any government in the United States by force or violence a crime. There is no comparable statute in the instant case. The government speaks "of inciting to criminal or perverted sexual conduct" (Br. 9). But there is no federal statute which provides that it is a crime to use the mails for the purpose of "inciting to criminal or perverted sexual conduct", and we submit that if there were such a statute it would not be constitutional. Moreover, as the petitioner has previously shown (Br. 30-33), there is no reliable evidence that so-called obscene publications or pictures have any appreciable effect on the conduct of human beings.

In addition, rather than publications causing some sort of sexual or other delinquency Professor Gellhorn has suggested that they may act as an emotional catharsis. After describing censorship as a nostrum rather than a remedy and observing that reliance on it will simply delay therapeutic and preventive steps that must be taken if youthful anti-social conduct is to be lessened, he makes the further point: "The offsetting *possibility* derives from the Aristotelian concept of emotional catharsis, shared now by many psychiatrists who believe that aggressions and frustrations that might otherwise flare into overt conduct are not fanned to flame but, instead, are more often dissipated, or at least made temporarily quiescent, by

reading." *Individual Freedom and Governmental Restraints* p. 64 (1956).

Other authorities are to the same effect. Dr. Benjamin Karpman, chief psychologist of Saint Elizabeth's Hospital in Washington, discusses the relation between reading and sexual action in his *The Sexual Offender and His Offenses* (1954), saying: "Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those who do not, for the reason that such reading often neutralizes what aberrant sexual interests they may have." At 485. See also Jahoda, *The Impact of Literature: A Psychological Discussion of Some Assumption In The Censorship Debate*, 37:40. (1954).

The government goes so far as to assert: "The common circulation of such material could hardly help but induce many to believe that their moral code was out of date and that they should do what, they suppose, others are doing". (Br. 60). We submit that this statement constitutes the sort of nonsense that we finally arrive at when the government decides to go into the business of censorship. We got along very well without obscenity statutes until about a century ago and we submit that we should all be better off if we went back to that approach today.

D.

Exclusion of the Federal Government from the Area of Obscenity, Pursuant to the First, Ninth and Tenth Amendments, Would Not "Open the Gates Wide" (Br. 39) as the Government Suggests, But Would Leave the Subject With the States Where It Belongs Under the Constitution.

The government concedes that there is "no question of the states having a reserved right to regulate obscene material in the United States mails", a view with which we agree, but then goes on to add: ". . . unless it is now found that the First Amendment prevents the Federal Government from doing so" (Br. 117).

Presumably the dire *caveat* of the government is based upon the line of cases following *Gitlow* v. *New York*, 268 U. S. 652 (1925), which applied the First Amendment to the states through the Fourteenth. It is, perhaps, appropriate to note that all this Court said in *Gitlow* v. *New York* was:

> "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the state." (268 U. S., at 666).

It is true that the quoted statement in *Gitlow* was taken by many to mean that the Fourteenth Amendment made the first eight Amendments applicable to state action. But as Justice Cardozo writing for the Court in *Palko* v. *Connecticut*, 302 U. S. 319, 323-325 (1937), and Justice Jackson in his dissenting opinion in *Beauharnais* v. *People*, 343

U. S. 250, 295 (1952), made plain, the only restraints upon state power imposed by the Fourteenth Amendment are those implied in the "concept of ordered liberty".

The applicable clause in the Fourteenth Amendment provides: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law"; that of the First Amendment: "Congress shall make no law". As Justice Holmes pointed out in his dissenting opinion in *Gitlow* the scope to be allowed to state action under the word "liberty" in the Fourteenth Amendment is of somewhat greater latitude "than is allowed to Congress by the sweeping language that govern, or ought to govern, the laws of the United States" (268 U. S., at 672).

In this connection it is significant that on other occasions Congress has provided for the transportation of material, the circulation or distribution of which various of the states prohibited. In the quarter of century before the Civil War, a federal statute made it a penal offense if any Postmaster should "unlawfully detain in his office any letter, package, pamphlet, or newspaper, with intent to prevent the arrival and delivery of the same to the person or persons to whom such letter, package, pamphlet or newspaper may be addressed or directed." Act of July 2, 1836 §32, 5 Stat. 87. Congress passed this Act after the failure of President Jackson's proposal for a law which would prohibit the use of the mail for what was then commonly referred to as incendiary publications. Yet, despite the federal act of July 2, 1836 the Southern States had various laws against the publication, reception, and distribution of incendiary matter.

Furthermore, in the rulings of the United States Attorney General; state laws obtained supremacy. In 1857

United States Attorney General Cushing ruled that a Mississippi statute forbidding delivery of incendiary matter was not in conflict with the federal law of 1836, and that no Postmaster was required to deliver material "the design and tendency of which are to promote insurrection". Similarly, in 1859 Postmaster General Holt ruled that a like Virginia statute did not conflict with federal law. To the postmaster at Falls Church, Virginia, he wrote that any postmaster might, after inspection of the mails, withhold delivery of any matter of "incendiary character." "The people of Virginia," he said, "may not only forbid the introduction and dissemination of such documents within their borders, but, if brought there in the mails, they may, by appropriate legal proceedings, have them destroyed." As quoted in Nye, *Fettered Freedom*, 69 (1949).

More recently, of course, there is the example of the federal government providing for the inter-state transportation of intoxicating liquors and yet assisting those states which have prohibition laws in the enforcement of such laws. See *James Clark Distilling Co.* v. *Western Maryland*, 242 U. S. 311, (1917). There is no difficulty in arranging for federal assistance in the maintenance of constitutionally permissible local standards.

But the government complains: "The Post Office could not have forty-eight standards of what was mailable" (Br. 117). We ask why not? We submit that such diversity is better than enforced conformity. We see no necessity for a federal Fair Morality Standards Act. Surely to let each state decide for itself concerning the morals of its inhabitants is better than to have one set of federal cultural officials in Washington or even one jury in any one community spoon-feed the whole American public on its

reading taste. See Justice Jackson's opinion for the Court in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943), and his concurring opinion in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945).

III.

The Concept of Obscenity Is Not Sufficiently Definite So That One Can Tell With Reasonable Certainty Whether One Is Violating a Statute Proscribing It.

The government argues that the concept of obscenity is not as vague as petitioner has suggested. (Br. 104-105). We submit that the government is mistaken and that a few concrete examples will demonstrate this.

Certain issues of two nudist publications *Sunshine & Health*, and *Sun Magazine*, were held to be obscene by the Supreme Court in New York County, *Sunshine Book Co.* v. *McCaffrey*, 112 N. Y. S. 2d 476 (1952), but those same issues and others like them were held to be not obscene by the Federal District Court in the District of Columbia. *Sunshine Book Company* v. *Summerfield*, C. A. 3007-53, July 13, 1953 *aff'd* 221 F. 2d 42 (D. C. Cir. 1954) *cert. denied*, 349 U. S. 921 (1955). Yet another federal judge in the District of Columbia subsequently found other but similar issues of *Sunshine & Health*, and *Sun Magazine* to be obscene. *Sunshine Book Company* v. *Summerfield*, 128 F. Supp. 564 (1955), *reversed on appeal*, (C. A. D. C. No. 12622, May 31, 1956), subsequently reargued before the full bench and decision pending.

Erskine Caldwell's *God's Little Acre* was held obscene in Massachusetts [*Attorney General* v. *Book Named God's*

Little Acre, 326 Mass. 281, 93 N. E. 2d 819 (1950)], but not in New York [*People* v. *Viking Press*, 147 Misc. 813, 264 N. Y. S. 534 (1933)], or Pennsylvania [*Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949), *aff'd*, 166 Pa. Sup. 120].

Edmund Wilson's *Memoirs of Hecate County* was found obscene in *Doubleday & Co.* v. *People*, 335 U. S. 848 (1948), *aff'g*, 297 N. Y. 689, 77 N. E. 2d 6 (1947), and was found to be not obscene and therefore importable by administrative action of the Customs Service in California.

Lillian Smith's *Strange Fruit* was held obscene in Massachusetts, [*Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945)] but not in other jurisdictions. One can catalog many other similar instances.

As Professor Gellhorn pointed out the word obsenity "does not refer to a thing so much as to a mood. It is a variable. Its dimensions are fixed in part by the eye of the individual beholder and in part by a generalized opinion that shifts with time and place." *Individual Freedom and Governmental Restraints* 55 (1956).

Anne L. Haight, *Banned Books* (2nd ed.; Bowker, 1955), informs us, for example, that Jonathan Swift's *Gulliver's Travels* was "denounced on all sides as wicked and obscene" when it was published in 1726 (p. 36); in 1841 Shelley's publisher was convicted for publishing a collection of his works including such pieces as "*Queen Mab*" and "*Prometheus Unbound*" (p. 52); Walt Whitman's *Leaves of Grass* was denounced upon its publication and continued to encounter legal difficulties for years afterward (pp. 61-62); Tolstoi's *The Kreutzer Sonata* was banned by the Post Office Department in 1890, and Theodore

Roosevelt denounced the author as a "sexual and moral pervert" (p. 65); Thomas Hardy's *Tess of the D'Urbervilles and Jude of Obscure* had rough sledding in England (p. 67). One of America's foremost literary critics, Edmund Wilson, was held at the height of his career to have written an obscene novel.

A concept leading to such diverse and strange results should be abandoned, at least in the criminal field.

CONCLUSION

A consideration of the government's brief makes it plainer than ever that the federal obscenity statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, violates the First, Fifth, Ninth and Tenth Amendments. The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

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against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SPECIAL REPLY BRIEF FOR PETITIONER

DAVID VON G. ALBRECHT,
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pointing up the unconstitutionality of this Act, is illustrative of his clarity of thought, great conscientiousness and industry.

He reverts to history and asks: "Should the First Amendment be interpreted in accord with the views prevalent among those who sponsored and adopted it, or in accord with subsequently developed views which would sanction legislation more restrictive of free speech and free press. He refers to Victorian morality and to its hypocrisy (2305).

Judge Frank states that "the short answer seems to be that the framers of the amendment knowingly and deliberately intended to depart from the English common law as to freedom of speech and freedom of the press." See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249; *Bridges* v. *California*, 314 U. S. 252, 264-265; *Patterson Free Speech and a Free Press* (1939) 101-102, 124, 125, 128; *Schofield, 2 Constitutional Law and Equity* (1921) 521, 525.

Judge Frank recognized that the Legislature has wide power to protect what it considers public morals. But the First Amendment severely circumscribes that power (and all other legislative powers) in the area of speech and free press.

Judge Frank indicated that subsequent punishment was practically prior restraint.

At 2308 the learned Judge said:

> "For a long time, much was made of the distinction between a statute calling for 'prior restraint' and one providing subsequent criminal punishment; the former alone, it was once said, raised any question of constitutionality vis-a-vis the First Amendment. Although it may still be true that more is required to justify legislation providing 'preventive' than 'punitive' censorship, this distinction has been substantially eroded. See, e.g. Dennis v. U. S., 341

U. S. 494; Schenck v. U. S., 249 U. S. 47; DeJonge v. Oregon, 299 U. S. 353; Thornhill v. Alabama, 310 U. S. 88, 97-98; Chaplinsky v. New Hampshire, 315 U. S. 568, 572 note 3. See also Hale, Freedom Through Law (1952) 257-265; Emerson The Doctrine of Prior Restraint, 20 Law & Contemp. Problems (1955) 648 (a thought-stirring discussion of the problem); Kalven, loc. cit. at 8-10, 13."

Judge Frank's opinion on this subject is backed up by even the New York Court of Appeals' (Fuld) opinion in *Brown* v. *Kingsley Books, Inc.*, which states:

"In point of fact, examination of the operation and effect of Section 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law. *There can be little doubt that the rigid enforcement of such penal provisions, though operating by indirection, may serve as effectually as direct action by injunction, if not more so, to deter publication of an obscene work* (see Pound, supra, 29 Harv. L. Rev. 640, 651; Emerson, supra, 20 Law and Contemporary Problems, at p. 660). *In the final analysis, the effectiveness of the injunctive remedy must itself depend upon punitive sanctions, by way of contempt proceedings, for its enforcement; and, if a publisher or vendor would not be deterred by the prospect of prosecution under the Penal Law, he might equally be unaffected by the threat of punishment for contempt.*"

An able article on prior restraints, 49 Columbia Law Review, draws the conclusion:

"Thus, to focus attention upon the form of the prohibition instead of its effect, is at best to substitute *maxim* for *reason*; at worst, it may lead to

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POINT I

The Federal Obscenity Statute (18 U. S. C., Sec. 1461, 62 Stat. 768, 69 Stat. 183) violated the freedom of speech and freedom of the press guarantees of the First Amendment, violated the due process clause of the Fifth Amendment, and violated the First, Ninth and Tenth Amendments in that it improperly invaded powers reserved to the states and to the people.

After reading the various briefs, both by the Government and other counsel, it is submitted that Judge Frank's appendix to his opinion is so thorough and canvasses the subject so well, that we should concentrate upon it.

Although Judge Frank has passed away, this appendix, which might more properly be called a thesis on the factors

> erroneous decisions. The continued utilization of the doctrine, time-honored though it is, is, therefore, not merely without positive merit *but* may present a danger that the real question involved in legislation affecting *speech* will receive inadequate attention. *Whatever the value of the prior restraints doctrine in the past it has outlived its usefulness.*'

A very important point made by Judge Frank is, that the statute as judicially interpreted, authorizes punishment for inducing more thoughts and feelings, or desires.

Reference is made (2309) to the test of obscenity contrived in 1868 by Cockburn, L. J. in *Queens* v. *Hicklin*, 3 Q. B. 360:

> "'I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall.' He added that the book there in question 'would suggest * * * thoughts of a most impure and libidinous character.'"

At page 2310, Judge Frank highlights the issue in this case by the following:

> "The test in most federal courts has changed: They do not now speak of the thoughts of 'those whose minds are open to * * * immoral influences' but, instead, of the thoughts of average adult normal men and women, determining what these thoughts are, not by proof at the trial, but by the standard of 'the average conscience of the time,' the current 'social sense of what is right.' See, e.g., *U. S.* v. *Kennerly*, 209 F. 119, 121; *U. S.* v. *Levine*, 83 F. 2d 156, 157; *Parmelee* v. *U. S.*, 113 F. 2d 729 (App. D. C.). Yet the courts still define obscenity in terms of the assumed average normal adult reader's

> sexual thoughts or desires or impulses, without reference to any relation between those *'subjective' reactions and his subsequent conduct*. The judicial opinions use such key phrases as this: 'suggesting lewd thoughts and exciting sensual desires'; 'arouse the salacity of the reader,' 'allowing or implanting.' * * * obscene, lewd or lascivious thoughts or desires,' 'arouse sexual desires.' The judge's charge in the instant case reads accordingly: 'It must tend to stir sexual impulses and lead to sexually impure thoughts.' Thus the statute, as the courts construe it, appears to provide criminal punishment for inducing no more than thoughts, feelings."

The *Kennerly* case was decided on December 1, 1913, and Learned Hand still followed the *Regina v. Hicklin* case. Judge Hand says:

> "That test has been accepted by the law of Federal Courts until it would be no longer proper for me to disregard it." (Quoting cases.)

He criticizes this law, however, saying that it may be consonant with mid-Victorian morals. He does not think we should be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, *supra*.

Judge Frank used the headnotes:

> "No Adequate Knowledge is Available Concerning the Effects on the Conduct of Normal Adults of Reading or Seeing the 'Obscene.'" (2310)
>
> "Effect of 'Obscenity' on Adult Conduct." (2312)
>
> "Effect of Conduct of Young People" (2313)
>
> "The Obscenity Statute and the Reputable Press." (2321)

"The Obscenity Statute and the Newspapers." (2322)

"Available Data Seem Wholly Insufficient to Show that the Obscenity Statute Comes Within Any Exception to the First Amendment."

If the obscenity statute is valid and Congress may constitutionally provide punishment for the mailing of books, evoking mere thoughts or feelings about sex, if Congress considers them socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially harmful deeds—if that be correct, it is hard to understand why similarly, Congress may not constitutionally provide punishment for such distribution of books, evoking mere thoughts or feelings about religion or politics, which Congress considers socially dangerous even in the absence of any satisfactory evidence that those thoughts or feelings would tend to bring about socially dangerous deeds (2325).

The Courts by their own will, have excluded the "classics" from the statute. If the many nude pictures which the defendant transmitted through the mails are obscene, then by merely turning to the reproductions in the articles on painting and sculpture in the Encyclopedia Britannica (14th edition), some of the latter are indistinguishably obscene. Yet these Encyclopedia volumes are readily accessible to everyone, young or old, and are frequently mailed to all parts of the country. Catalogues, of famous art museums, almost equally accessible and also often mailed, contain reproductions of paintings and sculpture, by great masters, no less "obscene."

No one can reconcile the currently accepted test of obscenity with the immunity of such "classics" as *e.g.* Aristophanes' Lysistrata, Chaucer's Canterbury Tales, Rabelais' Gargantua and Pantagruel, Shakespeare's Venus and Adonis, Field's Tom Jones, or Balzac's Droll Stories.

For such "obscene" writings, just because of their great artistry and charm, will presumably have far greater influence on readers than dull inartistic writings.

These socalled "classics" now freely circulated by any public library and transported by mail or interstate commerce, did not comport with the average moral attitudes at the time and place of its original publication. The real reason why the Courts have excepted the "classics" from the Federal Obscenity Statute, since otherwise most Americans would be deprived of access to many masterpieces of literature and the pictorial arts, and a statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the First Amendment. This exception —nowhere to be found in the statute—is a judge-made device invented to avoid that absurdity.

In his headnote "How censorship under the statute actually operates" and concludes that "Prosecutors, as censors, actually exercise prior restraint" (2328-2329). He then deals with judges and jurors as censors (2331-2322).

Another point brought out by him is "the dangerously infectious nature of governmental censorship of books" (2333).

"The people should be self-guardians: censorship by public opinion, not by government" (2333).

In speaking of "The seeming paradox of the First Amendment," he says this is unreal; "The Amendment ensures that public opinion—the 'conscience of the time'—shall not commit suicide through legislation which chokes off today the free expression of minority views which may become the majority public opinion of tomorrow."

"Private persons or groups, may validly try to influence public opinion" (2335).

"The fine arts are within the First Amendment's protection" (2335).

"To vest a few fallible men—prosecutors, judges, jurors—with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a 'moral police,' is to make them despotic arbiters of literary products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled. An author's imagination may be cramped if he must write with one eye on prosecutors or juries; authors must cope with publishers who, fearful about the judgments of governmental censors, may refuse to accept the manuscripts of contemporary Shelleys or Mark Twains or Whitmans" (2337).

Judge Frank is impressed by "Judge Box's decision as to causal relation to anti-social conduct" (2338).

At 2340 he speaks of "The void-for vagueness argument:" He states:

> "* * * * Now most Courts consider only the assumed impact on the thoughts or desires of the adult 'normal' or average human being." (2340)

A standard so difficult for our ablest judges to interpret is hardly one which has a "well-settled" meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, e.g., *International Harvester* v. *Kentucky*, 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.*, 244 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 885; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Champlin Refining Co.* v. *Commission*, 286 U. S. 120; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *N. Y.*, 333 U. S. 507; cf. *U. S.* v. *Cardiff*, 343 U. S. 169.

> "There is a stronger argument against the analogy of the 'reasonable man' test: *Even if the obscenity*

> *standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment.* See *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507; *Kunz* v. *New York*, 340 U. S. 290; *Burstyn Inc.* v. *Wilson*, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218." (2341)

In *Commonwealth* v. *Gordon, et al.*, 66 Pa. District and County Reports (1949), affirmed *sub nom* in *Commonwealth* v. *Feigenbaum*, 166 Pa. Super. 120, 70 A(2) 389 (1950); at page 156 Judge Bok held in connection with Section 524 of the Penal Code of Pennsylvania, which statute forbade the selling * * * or knowingly advertising in any manner, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, etc. It made such act a misdemeanor, and upon conviction such person should be sentenced to imprisonment not exceeding one year or to pay a fine not exceeding $500 or both.

In a fifty-five page opinion Judge Bok characterized by Judge Frank as one of our most reflective judges has researched and carefully analyzed the law as to obscenity.

Judge Bok says:

> "Nowhere in the statute is there a definition of it or a formula given for determining when it exists. Its derivation, ob and scena, suggests that anything done offstage, furtively, or lefthandedly, is obscene. * * * it merely proscribes books that *are* obscene and leaves it to the authorities to decide whether or not they are. This cannot be done without regard to the nature and history of obscenity. It is unlike the fundamental laws of property, of crimes like murder, rape and theft or even of negligence whose meaning has remained relatively constant. That of

obscenity has frequently changed, almost from decade to decade within the past century; 'Ulysses' was condemned by the State Courts in New York just 10 years before it was cleared by Judge Woolsey in the District Court for the Southern District of New York. I must determine what this elusive word means now."

* * *

"No such definition of standard or legislative intention occurs in section 524, and I am convinced that without a declaration of the legislature's intention as to what obscenity means or of what the lawmakers ought to prevent, there is no constant or reliable indication of it to be found in human experience. * * * 'The argument is often made that anyone can tell by instinct what is obscene and what is not, even if it is hard to put the difference into words.' * * * When he was an editor, Walter Hines Page deleted the word 'chaste' because it was suggestive, and the play 'Sappho' was banned in New York City because a man carried the leading lady up a flight of stairs. A librarian once charged Mark Twain's 'Tom Sawyer' and 'Huckleberry Finn' with corrupting the morals of children. In 1907 Richard Strauss's 'Salome' was banned in Boston. Charles Bronte's 'Jane Eyre', when first published, was called 'too immoral to be ranked as decedent literature'. Hawthorne's 'Scarlet Letter' was referred to as 'a brokerage of lust.' George Eliot's 'Adam Bede' was called 'The vile outpourings of a lewd woman's mind'. Others to suffer similarly were Elizabeth Barrett Browning's 'Aurora Leigh', Hardy's 'Tess' and 'Jude', DuMaurier's 'Trilby' and Shaw's 'Mrs. Warren's Profession'. Walt Whitman lost his job in the United States Department of the Interior because of 'Leaves of Grass'.

"It is presumed that Mr. Page and the others who attacked this imposing array of classics could

> tell by instinct what was decent and what was not. The idea that instinct can be resorted to as a process of moral stare decisis reduces to absurdity."

Judge Bok discusses the Constitution question at length citing all cases existing at that time on the subject.

Then the Judge adds:

> "It is not clear to me, nor, I venture to assert, would it be to the Supreme Court, if faced directly by an appropriate case of literary obscenity, what words inflict injury by their very utterance or how such injury is inflicted. As for the notion of an obscene book tending to incite to an immediate breach of the peace, the proper point of emphasis is the breach of the peace. That is different from saying that obscenity automatically tends to a breach of the peace, for the idea is unreal."

Discussing the *Kovacs* v. *Cooper* case and the *Winters* case, in which latter case where the court used language that obscene, lewd, lacivious, filthy, indecent or disgusting —were words well understood thru long use in criminal law etc., Judge Bok said:

> "The difficulty here is that insofar as they apply to literature, obscenity and its imposing string of synonyms do *not* have a fixed meaning through long use in the criminal law—or to put it the other way that they have a very narrow and restricted meaning quite at variance with the assumption that obscenity debauches public morals by a mysteropis and self-exciting process that can be feared but not proved."

Then after discussing the constitutional limitations of the First Amendment and the other constitutional limitations, he comes to the conclusion:

> "I hold that section 524 may not constitutionally be applied to any writing unless it is sexually im-

> pure and pornographic. It may then be applied, as an exercise of the police power, only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question: the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt. The criminal law is not, in my opinion, the custos morum of the King's subjects', as Regina v. Hicklin states: 'it is only the custodian of the peace and good order that free men and women need for the shaping of their common destiny'."

In refutation of the Government's claim as to the lack of protection offered by the Constitution to books, writings of any kind, we need only refer to the *Kingsley* case in the New York Court of Appeals, *supra*:

> "There is, of course, no doubt that freedom of speech and press, so basic to a free and dynamic society, extends to all media of expression (see Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 501-502; see, also, Chafee, Free Speech in the United States (1941), p. 545), that it protects distribution as well as initial publication (see Lovell v. Griffin, 303 U. S. 444; Grosjean v. American Press Co., 297 U. S. 233), and that it embraces writings or other forms of expression designed for entertainment or amusement, as well as those concerned with the exposition of ideas (see Winters v. New York, 333 U. S. 507, 510; Hannegan v. Esquire, Inc., 327 U. S. 146, 153). While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find

> justification in some overriding public interest, and that restricting legislation must be narrowly drawn to meet an evil which the state has a substantial interest in correcting (see Joseph Burstyn, Inc. v. Wilson, supra, 343 U. S. 495, 502-504; Feiner v. New York, 340 U. S. 315, 319; Niemotko v. Maryland, 340 U. S. 268, 271-272; Winters v. New York, supra, 333 U. S. 507, 509; Cantwell v. Connecticut, 310 U. S. 296, 307-308; Thornhill v. Alabama, 310 U. S. 88, 97-98, 105)."

Even in the *Winters* case, 333 U. S. 507, the Court said:

> "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

I wish to emphasize the first point in the brief for petitioner and the main point in his reply brief, namely, that the federal obscenity statute, 18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183, violates the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the states and to the people.

When the framers of the First Amendment provided "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *" they meant just that. Further support for this view may be found in the fact that the framers in their thinking insisted on the necessity of an overt act before the government could proceed against an individual. For instance, Thomas Jefferson in his draft of "A Bill for Establishing Religious Freedom", which he introduced into the Virginia Assembly in 1779, and which passed that body in 1785, stated:

> "* * * it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace

and good order * * * * " 2 *The Papers of Thomas Jefferson*, 545, 546 (Boyd ed. 1950); 12 Laws of Virginia, 84, 86 (Hening, 1823).

James Madison took a similar position. In his *Report* on the Virginia Resolutions of 1798, in answer to the argument that libels might tend to insurrections, in effect stated that then the thing to do was to pass laws necessary and proper for the suppression of insurrections. But there were to be no laws abridging freedom of speech or of the press. Madison wrote:

> "Let the question be asked, whether the power over the press exercised in the Sedition Act be found among the powers expressly vested in the Congress. This is not pretended.
>
> Is there any express power, for executing which it is a necessary and proper power?
>
> The power which has been selected, as least remote, in answer to this question, is that 'of suppressing insurrections': which is said to imply the power to *prevent* insurrections, by punishing whatever may *lead* or *tend* to them. But it surely cannot, with the least plausibility, be said, that the regulation of the press, and the punishment of libels, are exercises of a power to suppress insurrections. The most that could be said would be that the punishment of libel, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections." 6 The Writings of James Madison, 383, 384 (Hunt ed. 1906).

Mr. Justice Douglas in his dissenting opinion in *Dennis* v. *United States*, 341 U. S. 494 (1951) quoted with approval Jefferson's statement and added in a footnote:

> " * * * Whipple, Our Ancient Liberties (1927), p. 95, states: 'This idea that the limit on freedom of

speech or press should be set only by an actual overt act was not new. It had been asserted by a long line of distinguished thinkers including John Locke, Montesquieu in his The Spirit of the Laws ("Words do not constitute an overt act"), the Rev. Phillip Furneaux, James Madison, and Thomas Jefferson.'" At 590.

There can be no doubt but that the framers of the First Amendment intended that Congress should have no power whatever to abridge the freedom of the press.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1956 (Pet. App. 62; R. 125). An order by Mr. Justice Harlan was entered on October 9, 1956, extending the time for filing the petition for a writ of certiorari to and including November 17, 1956.[1] The petition was filed on November 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] Mr. Justice Harlan at the same time (October 8, 1956) granted petitioner's application for bail.

QUESTIONS PRESENTED

1. Whether the federal obscenity statute is unconstitutional.

2. Whether petitioner had a fair trial.

STATUTE INVOLVED

18 U. S. C. 1461 as it read at the time the crimes charged were alleged to have been committed provided: [2]

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—
>
> Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any

[2] The 1955 amendment to the statute, c. 190 §§ 1, 2, 69 Stat. 183, deleted the fifth paragraph and changed the first paragraph to read as follows:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and——."

kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on four counts (10, 13, 17, 24) charging mailing of

obscene, indecent and filthy matter in violation of 18 U. S. C. 1461 (R. 2a–3a, 4a–27a). Count 10 involved Exhibit 2, which was a circular advertising *Photo and Body, Good Times, Vol. 1, No. 10* (R. 13a). Count 13 involved Exhibit 4, which was a circular advertising *Good Times, Vol. 1 No. 8* (R. 16a). Count 17 involved Exhibit 11, which was a circular advertising *American Aphrodite No. 13* and *Good Times, Vol. 1, No. 5* (R. 20a). Count 24 involved Exhibits 7, 8, 9 and 10. Exhibit 7 was a form, Exhibits 8 and 9 were advertising circulars and Exhibit 10 was a book entitled *American Aphrodite, Vol. 1, No. 3* (R. 25a).[3]

On February 7, 1956, petitioner was sentenced to five years' imprisonment and fined $5,000 on count 10 (R. 2a). On counts 13, 17 and 24, petitioner was sentenced to five years' imprisonment and fined $1 on each count (R. 3a). The prison sentences on all counts were made to run concurrently and the $1 fines on counts 13, 17 and 24 were remitted.

On appeal the conviction was unanimously affirmed (R. 125; Pet. App. 62) upon a finding of clear evidence of obscenity (Pet. App. 2288).

ARGUMENT

1. All three judges in the Court of Appeals agreed that the materials mailed in this case were pornographic—obscene within the hard-core meaning of that term under the prevailing standards of all segments of our society. In attacking the constitutionality of the statute on this set of facts, petitioner is asking this Court to hold that it is totally beyond the power of Congress to ban from the mails materials no matter how obscene.

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[3] A chart of government exhibits is listed on R. 63.

The constitutionality of statutes excluding obscene matter from the mails has for so long been assumed settled, at least since *Rosen* v. *United States*, 161 U. S. 29, that it would seem no longer to be an open issue. See *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507–508; *Ex parte Jackson*, 96 U. S. 727, 736. 18 U. S. C. 1461 has survived attacks upon its constitutionality as follows: *Schindler* v. *United States*, 221 F. 2d 743 (C. A. 9), certiorari denied, 350 U. S. 938 (freedom of the press); *United States* v. *Rebhuhn*, 109 F. 2d 512 (C. A. 2), certiorari denied, 310 U. S. 629 (vague and indefinite); *Coomer* v. *United States*, 213 Fed. 1 (C. A. 8) (due process); *Tyomies Publishing Co.* v. *United States*, 211 Fed. 385 (C. A. 6) (freedom of the press and vague and indefinite); *Rinker* v. *United States*, 151 Fed. 755 (C. A. 8) (cruel and unusual punishment). See also *Besig* v. *United States*, 208 F. 2d 142 (C. A. 9) (relating to the prohibition on importing "obscene" matter in 19 U. S. C. 1305 (a)); *Doubleday & Co., Inc.* v. *New York*, 335 U. S. 848, where this Court affirmed a conviction under a state obscenity statute against the contention that the statute was unconsitutional because it violated the guarantees of free speech under the First and Fourteenth Amendments.

In ruling on the constitutionality of a state statute denouncing the use of offensive words in public, this Court said in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572:

> * * * There are certain well-defined and narrowly limited classes of speech, the prevention

> and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

See also *Beauharnais* v. *Illinois*, 343 U. S. 250, 266, where in ruling that the "clear and present danger" test does not apply at all to the prohibition of utterances not within the area of constitutionally protected speech the opinion states, "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

Recent cases involving obscenity issues, which petitioner cites (Pet. 11–12; 33–35) as indicating a disposition to reexamine the constitutional issue generally, involved far different questions from the one petitioner must on these facts make, *i. e.* that Congress has no right at all to punish the mailing of obscene literature. It has long been recognized that there is a difference between prior restraint on publication and punishment for a completed act. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503–504; *Gitlow* v. *New York*, 268 U. S. 652, 667; *Patterson* v. *Colorado*, 205 U. S. 454, 462. State movie censorship statutes dealing with prior restraint thus have no bearing here, where the statute imposes no prior restraint. Other

cases, such as *Winters* v. *New York*, 333 U. S. 507, and *Butler* v. *Michigan*, No. 16, this Term, recently argued before this Court, involve phraseology beyond the terms "obscene", "incident" and "filthy" which have been defined and given content by years of judicial construction.[4]

The argument that the statute is vague because its application may vary in particular cases (Pet. 15–20) has no significance to this case. As noted, all three judges in the court below agreed that the materials here involved were obscene by any meaning which the word has in our society. The possible existence of borderline cases does not render a statute unconstitutionally vague when there is a hard core of cases to which the statute unquestionably applies. *United States* v. *Harriss*, 347 U. S. 612, 618; *United States* v. *Petrillo*, 332 U. S. 1, 7.[5]

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[4] There are presently before this Court two appeals from state court rulings in which the Court has not yet noted probable jurisdiction. *Kingsley Books, Inc.* v. *Brown*, No. 107, involves the constitutionality of a New York statute under which the Corporation Counsel of the City of New York obtained an injunction to restrain appellants from distributing past and future issues of an obscene publication. The sole issue in the case is whether the statute is unconstitutional as imposing a "prior restraint" on free speech. In *Alberts* v. *California*, No. 61, involving a state conviction, appellant, although arguing that the words "obscene and indecent", are indefinite, is also contending that since he used the United States mails to distribute his wares, the state statute is void as applied because it conflicts with federal plenary power over the mails.

[5] Petitioner contends (Pet. 35–39) that the statute is rendered indefinite and hence unconstitutional because of the definition of "indecent" in the last paragraph of the statute to include matter "tending to incite arson, murder, or assassination." He argues

The argument (Pet. 21–32) that, even if obscenity can be regulated, only the states may do so is frivolous. It is too well established to need discussion that Congress may exercise its power over interstate commerce and the mails in aid of state law enforcement (*United States* v. *Hill*, 248 U. S. 420, 425), and may on its own prohibit the use of the mails for the transmission of socially undesirable materials. *Ex parte Jackson*, 96 U. S. 727, 736. See also *Donaldson* v. *Read Magazine*, 333 U. S. 178; *Public Clearing House* v. *Coyne*, 194 U. S. 497.

2. The existence of a large body of decisions by this Court and others upholding the right of both the Federal Government and state governments to regulate obscenity may not fully answer petitioner. The petition for certiorari must be read as a request that the Court now reconsider what has long been taken as settled. Petitioner frankly asks the Court to overrule a long line of cases and to declare invalid legislation of seventy-five years' standing. This request, in the light of Judge Frank's concurring opinion below, cannot be considered as frivolous. But it is submitted that the reasons advanced do not justify the reconsideration requested.

---

that this paragraph limits the meaning of the word "indecent" and that the District Court erred in not charging the jury to that effect. By its very terms, this provision enlarges, rather than limits, the definition as theretofore judicially interpreted. See *United States* v. *Davidson*, 244 Fed. 523, 532–534 (N. D. N. Y.). It has no bearing on this case where there was no allegation or intimation that the evidence in the case tended to incite arson, murder or assassination.

Two basic reasons are put forward as to why the Court might wish to reexamine the validity of laws on obscenity. The first of these is that, despite the numerous decisions of this Court upholding convictions under obscenity laws, the Court has produced no opinion which discusses at length the underlying theory and philosophy. The second reason advanced is that social and scientific studies now being made question the existence of a causal relationship between the reading of obscene material and subsequent delinquency or immoral conduct. Neither reason warrants the review now sought.

That the Court has written no lengthy opinion on the constitutionality of obscenity legislation is hardly a ground for reconsidering its validity. On the contrary, the very fact that no member of the Court over the years has felt the necessity of detailed discussion of the reasons why freedom of the press does not extend to obscenity indicates recognition of the soundness of the rule. Dissenting opinions and labored discussion have frequently been put forward as grounds justifying a reappraisal of constitutional issues. The lack of difficulty which the Court has had with this question in the past is not a ground for requesting reconsideration but rather a basis on which it should be denied.

Current social and scientific studies of the causes of juvenile and sexual delinquency referred to in the petition for certiorari (Pet. 13–15) and discussed in the Appendix to Judge Frank's concurring opinion (Pet. App. 2310–2321) do not provide a basis for upsetting the established validity of obscenity legislation. A generally recognized body of

scientific opinion which undercut the factual basis for a legal conclusion would justify a reexamination of that conclusion. But no such situation exists here. In the first place, the power to exclude obscene material from the mails does not depend upon any factual assumption that the obscene material will cause immoral or illegal conduct. Obscenity, like libel, fails to be accorded constitutional protection because of the content of the statements themselves, not merely because the statements may lead to action which may be prohibited. Secondly, even should Congressional ability to exclude obscene material from the mails be thought to depend upon a factual assumption as to the likely consequences of reading obscene material, there is now no generally accepted body of scientific opinion inconsistent with that factual assumption. As petitioner and Judge Frank point out, the experts disagree. Some believe that the unrestricted distribution of obscene and pornographic material would increase immoral conduct and juvenile delinquency. Others doubt it. Such diversity of views does not provide the kind of body of opinion which might justify upsetting decisions and laws of such long standing.

3. Petitioner contends that his trial was unfair in that (a) the charge to the jury was confusing and erroneous in its definition of statutory terms, (b) he was entrapped because his circular advertisements were answered by postal authorities, and (c) government counsel made inflammatory and prejudicial remarks.

(a). The judge gave all the instructions requested by petitioner and no exceptions were taken to the charge as finally given (R. 37a–38a). He shows no error in the charge which would warrant reversal under Rule 51, F. R. Crim. P.

(1). Petitioner argues that the trial court's charge confused the jury and that this confusion was manifested by the jury's choice of counts upon which it convicted (Pet. 48–51).

The trial court properly charged the jury that, with respect to the counts involving circulars (Counts 1 through 17, excepting 12), the jury should consider whether the circular was obscene on its face, and if it gave information where and how obscene matter might be obtained (R. 35a). Since the remaining counts involved material actually advertised in these circulars, the court next charged the jury (R. 35a):

> It follows, of course, if you were to find the defendant not guilty on all of the first seventeen counts, you would have to find him not guilty on the remaining counts.

This portion of the charge was so favorable to the petitioner that, when the jury asked for a clarification the government urged the court in chambers to charge the jury affirmatively (R. 40a):

> * * * that if they find that the exhibits are obscene, they must find that the circulars which advertised those exhibits are also obscene.

The court, however, declined to re-word the charge and had the stenographer read the same portion to the

jury as originally charged. After this portion was re-read to the jury, the court inquired (R. 45a):

> After listening to that, does that help any? Or do you have any specific question in addition to that that you want to ask the Court?

A juror then responded (R. 45a):

> I think that answers the question that we had, as far as I am aware. That was the only question, and that answers it fully.

After further brief colloquy the court asked: "Does that answer your question? Does that clear it up?" and the record shows that the jury nodded assent (R. 46a).

Nothing in the record shows any confusion, and the portion of the charge complained of is as favorable to the petitioner as it possibly could be.

Petitioner further argues that the four counts on which the jury convicted manifest the jury's confusion. The jury found petitioner guilty on Count 24 which involves a book entitled *American Aphrodite, Volume I, Number 3* (Govt.'s Ex. 10). It also found him guilty on Counts 10, 13 and 17, each of which involved advertising circulars. Petitioner argues that the verdict is inconsistent because Counts 11 and 12 on which petitioner was acquitted were identical to Count 10 on which he was convicted.

Petitioner is mistaken in his facts. Although the mailing charge in the indictment is the same, the exhibit in Count 10 (Govt.'s Ex. 2) contains a circular advertising *American Aphrodite, Volume I, Number 3* while no such circular is in the exhibits relating to Counts 11 and 12 (Govt.'s Exs. 3 and 29). The jury

might have found the petitioner guilty on any circular count because the circular was obscene on its face without regard to what it actually advertised. See *United States* v. *Traub*, 229 F. 2d 120 (C. A. 3). And in any event consistency in a verdict is not required.[6]

(2). Petitioner also contended that the court created vagueness in the statute by misdefining the word "filthy" found therein (Pet. 57). The matter was dealt with fully by the Court of Appeals (Pet. App. 2286–2288). As there pointed out, the definition is in accord with settled law. *United States* v. *Limehouse*, 285 U. S. 424, 426; *Tyomies Publishing Co.* v. *United States*, 211 Fed. 385, 390 (C. A. 6).

(b). Petitioner claims error in entrapment because his advertisements were answered by government representatives (Pet. 39–44; Exhibits 7, 8, 9, 10 and 11). This method of obtaining evidence was specifically approved in *Rosen* v. *United States*, 161 U. S. 29, 42, and has been usual at least ever since. *Ackley* v. *United States*, 200 Fed. 217, 222 (C. A. 8) (Pet. App. 2289).

(c). Petitioner contends he was deprived of a fair trial because of inflammatory and prejudicial remarks on the part of government counsel (Pet. 51–55). Petitioner then quotes small passages from the government's summation interspersed with his own comments.

This case was tried on a somewhat different theory than most criminal cases in that the entire defense

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[6] Defense counsel had argued that many of the counts dealt with the same printed matter and that the Government was "piling it on" (R. 13).

was predicated not on whether or not the petitioner committed the acts complained of, but rather on the effect of the material on the community at large. The general tenor of the instant petition follows the same pattern. For this reason the trial court properly allowed both counsel considerable latitude in arguing about the effect of the evidence on the community. An examination of both the government's opening (R. 1–8) and summation (R. 52–61) in proper context reveals no impropriety. The Court of Appeals disposed of this contention summarily by saying, "The government's summation in the case was within the scope of the evidence * * *" (Pet. App. 2289).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 40–96) is reported at 237 F. 2d 796.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1956 (R. 97). An order by Mr. Justice Harlan was entered on October 9, 1956, extending the time for filing the petition for a writ of certiorari to and including November 17, 1956 (R. 98). At the same time (October 9, 1956) Mr. Justice Harlan granted petitioner's application for bail. The petition for a writ of certiorari was filed on Novem-

ber 16, 1956, and was granted on January 14, 1957 (R. 98–99). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Court has limited the grant of certiorari to the following three questions presented by the petitioner (352 U. S. 964):

> 1. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech and freedom of the press guarantees of the First Amendment?
>
> 2. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?
>
> 3. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?

STATUTE INVOLVED

18 U. S. C. 1461 as it read at the time the crimes charged were alleged to have been committed provided:[1]

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

[1] The 1955 amendment to the statute, c. 190 §§ 1, 2, 69 Stat. 183, deleted the fifth paragraph and changed the first paragraph to read as follows:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and——."

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and

shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

STATEMENT

Petitioner was charged in a 26-count indictment for the mailing of obscene, indecent and filthy matter in violation of 18 U. S. C. 1461, and for conspiracy to violate said section (R. 2–21). During the course of the trial, held in the United States District Court for the Southern District of New York, the conspiracy count was dropped (count 26), as were counts 12 and 25, and the case went to the jury on 23 counts, (R. 1).

In sending the case to the jury, the trial judge charged that in order for petitioner to be found guilty of violating 18 U. S. C. 1461, the material placed in the mail (R. 25) "must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall," and further that "[t]he test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community." (R. 26). He further

charged that the "books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion." (R. 26). He made it clear that the jury was to "judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by presentsday standards." (R. 26).

The jury returned a verdict convicting petitioner on four counts (10, 13, 17, 24) (R. 1). Count 10 involved Exhibit 2, which was a circular advertising, among other items, *Photo and Body, Good Times*, Volume 1, No. 10 (R. 9–10). Count 13 involved Exhibit 4, which included, among other advertisements, a circular advertising *Good Times*, Volume 1, *No.* 8 (R. 12). Count 17 involved Exhibit 11, which was a circular advertising, among other publications, *American Aphrodite Number Thirteen* and *Good Times*, Volume 1, *No.* 5 (R. 14–15). Count 24 involved Exhibits 7, 8, 9 and 10. Exhibit 7 was a form, Exhibits 8 and 9 were advertising circulars, and Exhibit 10 was a book entitled *American Aphrodite*, Volume 1, No. 3 (R. 18–19).[2]

On February 7, 1956, petitioner was sentenced to five years imprisonment and fined $5,000 on count 10 (R. 1-2). On counts 13, 17 and 24, petitioner was sentenced to five years imprisonment and fined $1 on each count (R. 1–2). The prison sentences on all counts

[2] Exhibits relating to the counts on which petitioner stands convicted have been filed with the Clerk.

were made to run concurrently and the $1 fines on counts 13, 17 and 24 were remitted (R. 1–2).

On appeal, the conviction was affirmed by the Court of Appeals for the Second Circuit (R. 97) upon a finding of clear evidence of obscenity (R. 40–96).

SUMMARY OF ARGUMENT

I

A. The free speech and freedom of the press rights, which are protected by the First Amendment are not absolute rights. There are competing interests of society which must be considered. The problem in each case is to weigh the value of the speech which is restrained, the interest of society served by the restriction, and the form of the restraint imposed.

B. Obscene publications have a negligible social value. They contain next to nothing in the way of ideas, information or opinions.

1. Historically it is apparent that obscene speech was not considered to be within the scope of the First Amendment's protection. Contemporaneously to the adoption of the Bill of Rights there were vigorous restraints on profanity and related forms of speech. These restraints, many of which would now not be upheld, convincingly demonstrate that absolute freedom of speech was not what the founding fathers had in mind, at least where the interest in public morality was at stake.

2. The decisions of this Court indicate that certain kinds of speech, such as opinions in the realm of politics, economics and religion, have a greater social value than other kinds, such as commercial circulars.

At the bottom of such a scale of values appears such speech as libel, epithets, and obscenity.

3. The obscene material which cannot be mailed under Section 1461 is limited to that material which is "calculated to corrupt and debauch the minds and morals" of the average member of the community. The charge to the jury properly construed the statute as applying only to such material.

The bulk of the material made non-mailable by this section is commercial pornography of the most vile sort. The appellate cases deal only with the occasional book of possible literary merit which is concentrated on explicit discussion of sex in terms not tolerated by the community; these cases give no fair guide to the basic problem—"hard-core" pornography—at which the statute is directed. Also caught by Section 1461 is an occasional product of the borderline operator, who is catering to the erotic interest but hopes that his material is not so bad that a jury will convict.

Together, such books and borderline entertainment material constitute less than 10 percent of the convictions under Section 1461 dealing with published material. Over 90 percent of such convictions under the statute are for the mailing of material which is "hard-core" pornography—commercially produced booklets and photographs dealing with every form of sexual perversion and activity known.

To restrain the circulation of obscenity does not prevent any idea from being discussed or circulated. No book is obscene because of the ideas it contains, but rather from the way in which the matter is

expressed. The rules of the Court barring scandalous matter from briefs, or the rules of public parks barring a man from speaking with his clothes off, do not prevent the discussion of any idea or the voicing of any opinion.

C. The public interest served by the restraint, the preservation of public morality, is of substantial importance to the community and would be seriously injured by the unrestricted circulation of obscene material through the mails.

1. Petitioner argues that the only public interest which can justify any restraint on absolute freedom of speech is the prevention of conduct to which the speech incites. There is substantial ground for believing that obscene material causes immoral conduct, but it is also clear that interests other than the prevention of conduct justify restraints. For example, such interests as the protection of the peace and quiet of the home from loud and raucous noise or from the interruptions of magazine peddlers have been held to justify reasonable restraints on speech and press.

2. As applicable to a case of this kind, the clear-and-present-danger test requires only that there be a showing that the social interest which is being served is in substantial danger of being injured unless the restriction is adopted. A solicitor at the door creates a clear and present danger of disturbing the privacy of the home. It is in this sense that such a test may be applied to the circumstances here.

3. The interest in the preservation of public morality has long been recognized by this Court, and long

regarded as an adequate basis for legislation. Legislation has ranged from controlling lotteries, preventing gambling, or keeping children off the streets, to preventing trains from running on Sundays. In each instance the interest in public morality has justified the restraint.

4. The distribution of obscene material would adversely affect this interest in public morality in several different ways. It would create an immediate risk of inciting to criminal or perverted sexual conduct. No one can establish the extent to which such conduct is caused, but the risk is certainly there. The distribution of the obscene which is, by hypothesis, likely to corrupt the morals of the average person, creates a substantial risk of breaking down the existing moral restraint and leading to prohibited conduct over a period of time. It is not necessary that a particular speech create a risk of an attempt to overthrow the government; it is enough if an unrestrained succession of speeches would do it. Similarly with obscenity, the cumulative effect of circulating material likely to corrupt morals creates a long-run risk of bad conduct.

Obscene material, like libel and epithets, also creates an immediate and direct psychological injury. Sending an obscene circular in the mail creates as great a risk of upsetting the recipient as calling him or her names. Further, the public has an interest in maintaining the privacy of the home free from invasion by pornography. The home is the central teacher of personal morals and spiritual values. Families have an interest in

maintaining the home and their private affairs free from debasement.

Moreover, public morality is an indivisible whole. One cannot safely corrupt that part dealing with sexual morality without adversely affecting the moral force which governs society in other ways. It is the moral force behind the laws, not the pieces of paper, which in fact is the constitutional framework of organized society. The breaking down of the respect for morality weakens the "morals" and the entire fabric of respect for law.

D. The restriction involved in Section 1461 is narrow and appropriate to its purpose. It does not involve the problems of administrative discretion or prior restraint. Here, there is no danger of abuse of administrative discretion or prohibiting the writing or publishing of any idea. If there is to be any restraint, it is well recognized that a criminal statute which provides for post-conduct punishment after trial by jury is the best possible form.

Section 1461 is a narrow restriction, applying only to obscene material and restricting its circulation only by one means, the United States mail. The United States has special rights over the postal service and may properly decide not to carry a certain category of material, deemed worthless at best, even if it could not restrict its distribution by other means. The narrowness of the restriction is demonstrated by the lack of alternatives.

E. In balancing the competing interests affected by the restraint, those interests must be given the value which they have to society. Changing views as to

what falls *within* the concept of obscenity must not be confused with the unchanging view with which society has regarded that which is obscene.

1. The competing interests involved in this case have been weighed by all institutions of organized society with the universal conclusion that obscenity must be restrained. Over 50 countries are parties to the International Agreement for the Suppression of the Circulation of Obscene Publications. The United Kingdom, which has been re-examining its obscenity laws, is now considering the adoption of a new statute which is remarkably similar to the American law. Every state in the Union except one has adopted legislation to restrain the publication and sale of obscene material. During a period of over one hundred years, running from 1842 to 1956, Congress has adopted some twenty laws dealing with restrictions on the importation or distribution of obscenity. This legislative judgment is entitled to great respect.

The courts, both state and federal, have considered such restraints as valid and have indicated the large social interest at stake in the preservation of public morality. This Court, time and again, has not only upheld the present statute and its predecessors but has used the recognized validity of this legislation as a starting point in upholding other statutes. From *Ex parte Jackson*, 96 U. S. 727, in 1877, to *Beauharnais v. Illinois*, 343 U. S. 250, in 1952, the Court has repeatedly based a decision on the premise that the United States could constitutionally restrain the distribution of obscene material. Recognized proponents of free speech, such as Professor Chafee, have also

concluded that the postal statute falls within the valid powers of Congress.

2. Variations as to what, at a given time, falls within the concept of obscenity reflect no change in the universal disfavor with which obscenity has been held. Within the United States the edges of obscenity have been melting, so that whatever idea content there may be that is restrained it is less than was restrained before. Today, when less falls within the concept of obscenity, there is less reason than ever before to allow material that is admittedly obscene to circulate through the mails.

II

There is no violation of the Fifth Amendment:

A. The postal obscenity statute is not so broad that it "burns down the house to roast the pig." On the contrary, it is narrowly limited to the evil at which it is directed and does not deprive petitioner of his liberty without due process of law. Unlike the statute involved in *Butler* v. *Michigan,* 352 U. S. 380, the federal statute restrains the circulation of only such material as is likely to corrupt the morals of the average member of the community—not the child or the particularly susceptible. Assuming the validity of the statute under the First Amendment, namely that Congress can restrain distribution to persons likely to be corrupted by the material, the only conceivable narrowing of the statute would be to except that minority not likely to be affected. But there is no way in which this minority can be identified. Some persons might not be susceptible to some obscenity but might to such pornography as the motion picture films of sex orgies. Further, Congress is not required by due process to make special exceptions for

the unusual individual. Also, a restriction applied to the mail may properly apply to all, since it is highly impractical to determine whether the addressee is susceptible or not, a distinction which might more easily be made in an over-the-counter transaction.

B. The standard laid down in the statute is not so vague or indefinite as to deprive petitioner of his liberty in violation of the Fifth Amendment. The common law background and years of judicial construction leave no one in doubt as to the central mass of material which is barred by the statute. The statute is primarily directed at dirt for dirt's sake—material which explicitly and purposefully deals with sex conduct in a degraded or perverted way with no compensating artistic aspect whatever.

In the nature of the problem it is impossible to have a precise and fixed boundary along which one can safely skirt with no risk of going over the line. Words and photographs do not lend themselves to any such sharp and certain distinctions. Publishers, such as petitioner, know not only the central mass of concededly obscene material but also know full well the shoal waters in which they sail. They know the interests to which they are catering. They wish to go as far as they can, and take their chances on a jury's verdict. When they get caught they cannot rightly say that the statute was so vague that they did not know what it meant.

The statutory standard is the best that has been devised. Taken with the clarification of judicial construction, there can be no doubt that it lies within the realm of legislative judgment. State statutes illus-

trate alternative forms of expression but fail to indicate that greater precision is possible. The Obscene Publications Bill now pending in Great Britain, after years of discussion, adopts a statutory standard remarkably like that which was given the jury in this case.

The statutory concept of obscenity meets the tests of definiteness laid down by the Court. It gives adequate notice and is at least as definite as other standards, such as reckless driving, which have been approved. The very standard here involved has not only been approved by the Court but used as a basis of decision in reaching conclusions as to other statutes.

III

Section 1461 has been challenged as infringing on unenumerated rights reserved to the people by the Ninth Amendment. The statute, however, is an exercise of the specifically delegated postal power. Unless the statute is prohibited by the First Amendment it thus lies within one of the delegated powers. Petitioner's argument would require the recognition of a special "right to be obscene" which is greater than the freedom of the press protected by the First Amendment and which, implicitly, subtracts from the delegated powers. There is neither authority nor reason behind such a proposition.

IV

Similarly, petitioner's arguments as to the Tenth Amendment must fall if he cannot prevail on the First. The full power over the postal service was

given to the United States; none was reserved to the states. That the United States may freely exercise its delegated postal and interstate commerce powers to regulate such generally local matters as lottery tickets and the transportation of women for immoral purposes is clear. Similarly, Congress may bar the use of the mails to obscene material unless it is prevented from doing so by the First Amendment. If Section 1461 does not violate the First Amendment, it does not violate the Tenth.

The decision as to what may legally pass through the United States mail is peculiarly a subject for unified regulation. The Court should not strain to find that a power was reserved to the states where the result would be to subject the content of the mails to different rules in every state through which they passed.

To hold Section 1461 invalid would not leave the states free to regulate obscenity, as petitioner suggests. The historical material to which he refers relates to the period prior to the adoption of the Fourteenth Amendment. This Court has made clear that the freedom of the press protected by the First Amendment is part of the liberty protected by the Fourteenth. If the content of obscene material is of such value that the United States must carry it through the mails, it is difficult to believe that the states could impose the greater restraint of restricting its publication or sale.

ARGUMENT

Under the limited grant of certiorari, the sole issue before the Court is the constitutionality of the

statute which makes it a criminal offense to mail "obscene, lewd, lascivious, or filthy" publications. There is not before the Court any question relating to the particular advertising circulars or other matter mailed by petitioner. Those exhibits were found obscene by the jury, the Court of Appeals affirmed, and this Court denied certiorari on that question. Pet. 2–3; 352 U. S. 964.

Other questions *not* before the Court are those arising from administrative exclusion of obscene matter from the mails. We are here concerned with the application of Section 1461 as a criminal statute which creates an offense of mailing obscene matter and authorizes punishment for such an offense after trial by jury.

Under the questions which the Court has agreed to review, it will consider the validity of Section 1461 on its face and as it has been construed. The Government adopts the construction placed on the statute by the trial court and confirmed by the Second Circuit. There are, of course, other instructions which would be equally within the statute—additional factors which the jury may be allowed to take into account—but the general scope of the statute is properly reflected in the charge below.

Section 1461 is here challenged on four separate constitutional grounds. The validity of the statute has been upheld so often that these attacks might be

dismissed on the basis of *stare decisis* alone. See *infra*, pp. 84–92. Because of the basic questions raised by Judge Frank's concurring opinion below (R. 48–96) and the limited grant of certiorari, we have assumed that the Court may wish to re-examine the merits of its prior decisions. This brief attempts to consider and weigh the competing interests involved. If errors have been made in the past—if freedom of the press has been unduly restrained—the Government has no interest in continuing that restriction. However, we believe that an examination of society's interests, as they are valued by society, overwhelmingly demonstrates the validity of the marginal restraint on publications which is imposed by Section 1461.

That this brief reargues the merits of the issues involved in no way lessens the weight which we believe should be given to the prior decisions of this Court. For over a hundred years, Congress has adopted restrictions on the circulation of obscene material in a series of statutes of which the most recent was enacted last year. Forty-seven states have adopted comparable restrictions. Time and again, this Court and others have upheld the validity of restrictions directed at such worthless, offensive, and damaging material. We believe these views are entitled to the greatest of weight. The Court cannot, if it would, approach this problem as a new question.

> courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. * * *

The rejection of absolute standards does not mean that the Court must look at each First Amendment case afresh and without guiding criteria. For the balancing of competing interests there is a framework of principle and standards of value developed in the prior decisions of this Court. These require the weighing of three basic factors:—the value of the kind of speech involved, the public interest served by the restriction, and the extent and form of the restraint imposed. We propose to examine the federal obscenity statute, 18 U. S. C. 1461, in the light of the standards developed in this Court's decisions.[5]

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[5] By this process of balancing interests, the Court has upheld certain federal restrictions on free speech in a large number of cases. *E. g., Schenck* v. *United States, supra; National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *Lorain Journal* v. *United States*, 342 U. S. 143, 155–156; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 94–104; *American Communications Assn.* v. *Douds, supra; Dennis* v. *United States, supra; United States* v. *Harriss, supra.*

The number of cases involving state restrictions is, of course, even larger. *E. g., Cox* v. *New Hampshire*, 312 U. S. 569; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Valentine* v. *Chrestensen*, 316 U. S. 52; *Prince* v. *Massachusetts*, 321 U. S. 158; *Feiner* v. *New York*, 340 U. S. 315; *Breard* v. *Alexandria*, 341 U. S. 622; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, 339 U. S. 460; *Teamsters Union* v. *Hanke*, 339 U. S. 470.

B. The value of the speech involved—Obscene publications have a negligible social value in the market place of ideas, opinions, and information

The value of obscene material must be judged against the purpose of the First Amendment. Historical study shows that the basic objective of that Amendment was to assure freedom of political comment and criticism of the Government. History also indicates that, at the time the Bill of Rights was adopted, speech such as profanity and obscenity was considered to be subject to legislative restriction. And by any measuring rod, ancient or modern, it is plain that obscene material has, at the most, no more than a negligible social utility. It clearly rates very low on the scale of values.

1. THE HISTORICAL PURPOSES OF THE FIRST AMENDMENT DID NOT INCLUDE PROTECTION OF THE OBSCENE.

(a) The social and political history of the era when the Constitution and the Bill of Rights were adopted shows indisputably that obscenity, profanity, and lewdness were strongly disfavored at that time, and considered unworthy of protection. The First Amendment could not have been designed to encourage or guard such speech. More rigorous restrictions than we now suggest were not considered to violate First Amendment freedoms by the community that adopted the Constitution and the Bill of Rights.

Profanity, for instance, was unanimously condemned at the time of the adoption of the First Amendment, and never thought to be immune from criminal sanction by the community. During the Revolutionary

War, the Continental Congress sought to stamp out the use of profanity by the armed forces:

> It being represented to Congress, that profaneness in general, and particularly cursing and swearing, shamefully prevails in the army of the united States, it is therefore, *Resolved*, That General Washington be informed of this; and that he be requested to take the most proper measures, in concert with his general officers, for reforming this abuse.[6]

The writings of Washington are replete with directives and orders to his troops condemning and outlawing profanity.[7] Moreover, though the majority of the states had free press provisions in their constitutions at the time of the adoption of the First Amendment [7a]

[6] Journals of The Continental Congress, vol. VII (February 1777), p. 157.

[7] "Purity of Morals being the only sure foundation of publick happiness in any Country and highly conducive to order, subordination and success in an Army, it will be well worthy the Emulation of Officers of every rank and Class to encourage it * * *; The wanton Practice of swearing has risen to a most disgusting height; A regard to decency should conspire, with a Sense of Morality to banish a vice productive of neither Advantage or Pleasure * * *". Writings of Washington, Oct. 1778–Jan. 1779, vol. 13, pp. 118–119 (General Orders, October 21, 1778). See, also, Writings of Washington, vol. 1, pp. 179, 382, 392, 396; vol. 3, p. 309; vol. 5, pp. 32, 367; vol. 8, p. 152; vol. 16, p. 13.

[7a] Article XVI of the Constitution of Massachusetts of 1780 provided: "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth." Of similar import see: Article 1, § 5, Constitution of Delaware (1792); Article IV, § 3, Constitution of Georgia (1789); Section 38 of the Declaration of Rights of the Constitution of Maryland (1776); Article 1, Section 22, Constitution of New Hampshire (1784); Article 15 of the

all the states condemned profanity. Thus, in Virginia the legislature that enacted the declaration "That the freedom of the press is one of our great bulwarks of liberty; and can never be restrained by despotick governments," did not think it inconsistent to direct that any soldiers or officers of Virginia suffer criminal penalty if guilty of profane "cursing or swearing".[7b]

William Rawle, the first of the commentators on the Constitution, pointed out that the right of a free press does not protect offensive publications.[8] All of the states had long-standing statutes directed against profane swearing as an offense against public morality.[9] The reported cases of the early period of our history held that profane expressions, offensive to public morality, were subject to criminal sanction and not within free speech or press protection. See, *e.g., The People* v. *Ruggles,* 8 Johns

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Declaration of Rights of the Constitution of North Carolina (1776); Article 12, Constitution of Pennsylvania (1776); Section 43 of the Constitution of South Carolina (1778); Chapter 1, Section XV, Constitution of Vermont (1786). Vermont was admitted to the Union on February 18, 1791. These provisions are collected in Poore, Constitutions and Charters (1878).

[7b] Journals of The Convention of Virginia, Ordinances of the Convention of July 1775 (1816 ed.), p. 39. The Declaration of Rights was passed one year later on June 17, 1776. See Rutland, *The Birth of the Bill of Rights* (1776–1791), 232.

[8] See, Antieau, *Judicial Delimitation of The First Amendment Freedoms*, 34 Marquette L. Rev. 57, 68.

[9] See *e. g.* 2 Swift, *Connecticut System of Laws* (1796), p. 327; *An Act For The Encouragement of Literature and Genius*, enacted in January 1783, Connecticut Statutes (1796) pp. 282–284; 2 Jones and Varick, *New York Laws* (1787–1789), pp. 257–258, adopted February 23, 1788; Iredell, *North Carolina Laws* (1791), adopted in 1741, p. 77; Virginia Compiled Laws (1776–1803) 2nd ed., p. 389, adopted December 26, 1792.

pointing out that the First Amendment protects materials of an entertainment value as well as ideas, noted that such materials are "equally subject to control if they are lewd, indecent, obscene or profane. *Ex parte Jackson,* 96 U. S. 727, 756; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568."

To Professor Chafee, the basic purpose of the free press provision of the First Amendment, as conceived by the drafters, was "to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions." [15] It is past dispute that the condemnation of the excesses of the English doctrine of seditious libel was the most important factor motivating the adoption of the First Amendment.[16] The Maryland ratifying convention proposed a free press amendment to the federal constitution on the ground that "[i]n prosecutions in the federal courts for libels, the constitutional preservation of this great and fundamental right may prove

[15] Chafee, *Free Speech In the United States* (1941 ed.) 22. Yet even as to political speech the 18th Century community was not thinking in absolute terms. "The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of at least three convictions for political libels obtained between 1799 and 1803." Mr. Justice Frankfurter, concurring; *Dennis* v. *United States*, 341 U. S. 494, 517, 521.

[16] During the Constitutional convention itself, there was little debate concerning free press. Early in the convention, Charles Pinckney of South Carolina proposed a draft constitution prohibiting the passage of any law "* * * touching or abridging the liberty of the press: * * *". This proposal although reported to committee was apparently never acted upon. Later in the convention a similar proposal went to a vote but was defeated. 5 Elliot's Debates, 129–131, 445. See Patterson, *Free Speech and A Free Press* (1939 ed.), 116–117.

invaluable."[17] In Virginia, George Mason posed the following possibility if no free press provision was adopted.

> * * * Now, suppose oppressions should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press * * *.[18]

See also Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 569–570; 2 Schofield, *Constitutional Law and Equity* 515, 535.

The *affirmative* aims of the First Amendment—the converse of the negative aim to abolish seditious libel—were well put about a decade and a half before it was adopted in a letter to the inhabitants of Quebec, in 1774, by the Continental Congress:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiment on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or

[17] 2 Elliot's Debates 552.

[18] 3 Elliot's Debates 441–442.

I

The First Amendment

CONSIDERING THE WORTHLESSNESS OF THE SPEECH RESTRICTED, THE STRONG SOCIETAL INTEREST IN PUBLIC MORALITY AND THE EFFECT OF OBSCENE MATERIAL ON THAT MORALITY, AND THE FORM OF THE RESTRICTION INVOLVED—18 U. S. C. 1461, WHICH MAKES IT A CRIME TO MAIL OBSCENE MATTER, DOES NOT VIOLATE THE FREEDOM OF SPEECH OR FREEDOM OF THE PRESS GUARANTIES OF THE FIRST AMENDMENT

Petitioner's attack on the statute is simple and straightforward:—the First Amendment provides that Congress shall make *no* law abridging the freedom of speech or of the press; a statute that makes it a crime knowingly to deposit obscene matter in the United States mails imposes a restriction on the distribution of certain types of printed matter; such a restriction, petitioner says, necessarily abridges the freedom of the press because it has not been proved that the distribution of obscenity creates a clear and present danger of criminal conduct.

The Government's position, on the other hand, is that under the First Amendment there must be a weighing of competing interests; First Amendment freedoms are not questions of absolute rules and absolute exceptions. The Amendment is not a rigid rule against all regulation of speech or press but rather requires a weighing of relevant factors, including the type of speech involved, the reason for the restriction, and the method of restriction employed. On such a weighing, obscenity is seen to be clearly

subject to the criminal restriction imposed by 18 U. S. C. 1461.

A. Free speech and free press are not absolute rights constitutionally free from all restriction, but are subject to a balancing of relevant interests

There is, of course, no better settled principle of constitutional law than that the freedoms referred to in the First Amendment are not absolute, and that every appeal to that provision requires a weighing of relevant interests. As the Court put it recently in *Breard* v. *Alexandria*, 341 U. S. 622, 642:

> The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life [citations omitted].[3]

"No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values."[4] And the late Professor Chafee has commented (*Free Speech in the United States* (1941) 35):

> The true boundary line of the First Amendment can be fixed only when Congress and the

[3] See also, *e. g.*, *Schenck* v. *United States*, 249 U. S. 47, 52; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Pennekamp* v. *Florida*, 328 U. S. 331, 336; *American Communications Association* v. *Douds*, 339 U. S. 382, 399; *Dennis* v. *United States*, 341 U. S. 494, 508; *United States* v. *Harriss*, 347 U. S. 612, 625–626.

[4] Professor Paul Freund, as quoted in Justice Frankfurter's concurring opinion in *Dennis* v. *United States*, 341 U. S. 494, 517, 542–43.

(N. Y.) 290 (1811); *The State* v. *Chandler*, 2 Harr. (Del.) 553 (1837); cf. *Updegraph* v. *The Commonwealth*, 11 S. and R. (Pa.) 394 (1824). In short, the latter 18th Century would have been shocked by any contention that serious profanity was protected by the First Amendment.[10]

Similarly, calculated obscenity stood condemned as contrary to public morality. *The Commonwealth* v. *Sharpless, et al.*, 2 S. and R. (Pa.) 91, decided in Pennsylvania in 1815, imposed a criminal sanction for the commercial showing of an obscene painting. And in *Ruggles, supra*, an 1811 case dealing specifically with abusive and vile language, the court pointed up that profanity and obscenity are of the same cloth (*Ruggles, supra* at 294–295):

> Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; * * *.

Apparently the only other reported early case resulting in a conviction for the publication of an obscene book was in *Commonwealth* v. *Holmes*, 17 Mass. 336 (1821). But as early as 1711, Massachusetts had a statute in force punishing obscene publications.[11] A

[10] See generally, to the same effect, Schofield, 2 *Constitutional Law and Equity* (1921) 532; Cooley, *Constitutional Limitations* (7th ed. 1903) 674; 2 Bishop, *Criminal Law* (9th ed. 1923), Sections 74–84, pp. 53–61; Chafee, *Government and Mass Communications* (1947), vol. 1, pp. 54–56, 196–197; Zollman, *Religious Liberty in The American Law*, 17 Mich. L. Rev. 355, 457; Note, *The Legality of Atheism*, 31 Harv. L. Rev. 289.

[11] Vol. 1, Acts and Resolves of Massachusetts Bay (1692–1714), Section 19, p. 682. The same section punished profane swearing as well.

similar statute was enacted in Connecticut in 1834,[12] and in New Hampshire one was in force at least as early as 1842.[13] The absence of many reported cases, and statutory restrictions, is understandable when one considers that the vigors of frontier life and the lack of leisure was such that the "situation was not sufficiently acute for legislation."[14]

(b) We have discussed the revulsion against profanity and calculated obscenity by the society which adopted the First Amendment not only to indicate their objection to this type of expression, but to highlight that the free dissemination of such material was not within the general purpose of the Amendment. As this Court has phrased it, free press means "that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion * * *. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." *Thornhill* v. *Alabama*, 310 U. S. 88, 95. See also *Stromberg* v. *California*, 283 U. S. 359, 369; *Pennekamp* v. *Florida*, 328 U. S. 331, 346; *Thomas* v. *Collins*, 332 U. S. 516, 531. Cf *Winters* v. *New York*, 333 U. S. 507, 510, where the Court, in

[12] Connecticut Revised Statutes (1849), §§ 135–136. This statute also imposed a criminal sanction on profane swearing. (§ 132)

[13] Revised Statutes of New Hampshire (1842), c. 113, § 2, p. 221. The same section punished profanity.

[14] Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 36, 60. According to these writers, prosperity and leisure brought obscenity legislation.

> intimidated into more honorable and just modes of conducting affairs.[19]

In sum, the drafters sought protection of "such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[20] But they did not seek to protect all speech—no matter how far removed from, or how little helpful to, the attainment of that objective. They did not place obscenity, lewdness, and profanity on the same plane as the political or social communication of ideas.

2. THE COURT'S DECISIONS INDICATE THE COMPARATIVE VALUE OF DIFFERENT KINDS OF SPEECH

Before turning to the "value" of obscenity, it may be worthwhile to suggest the comparative values of different kinds of speech as they have been worked out in the prior decisions of this Court on the basis of the purposes of the First Amendment. No rigid or arbitrary scale of values can be stated, of course, since much depends upon the circumstances, and there will be inevitable differences as to which, of two kinds of speech, should be placed higher on the list. But that there does exist some such comparative scale of value seems certain. The following is tendered as illustrative:[21]

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[19] Quoted in *Near* v. *Minnesota*, 283 U. S. 697, 717.

[20] Cooley, *Constitutional Limitations* (7th ed. 1903) 604.

[21] *Amicus curiae* Morris Ernst suggests that all speech can be divided into three categories: (1) ideas of sedition, (2) "merchandise words" (which promulgate ideas only to sell lottery tickets, stocks, bonds or other things), and (3) ideas for ideas' sake (Brief of Morris L. Ernst, *Amicus Curiae*,

political speech
religious
economic
scientific
general news and information
social and historical commentary
literature
art
entertainment
music
humor
commercial advertisements
gossip
comic books
epithets
libel
obscenity
profanity
commercial pornography

This Court has referred to the basic purpose of the First Amendment in many ways, but all point to the exchange of *ideas* in the political or economic realm. In *Stromberg* v. *California*, 283 U. S. 359, 369, the Court said:

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pp. 3–8). Although this analysis is helpful, in recognizing that different kinds of speech are accorded different kinds of protection, depending upon content, it is submitted that speech and press do not divide into any such nice compartments. It is not clear where speech advocating polygamy, for example, would fall, or how the difference between raucous sound truck activity and more reasonable speech is reflected in such an analysis. Also, it seems to us that the analysis begs the basic First Amendment question in this case, whether commercially-produced pornography is in "the sacred area" of ideas *qua* ideas which, Mr. Ernst states, the Constitution removes from the national governmental power.

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

In *Dennis* v. *United States,* 341 U. S. 494, 503, it was said that the basis of the First Amendment was the hypothesis that "free debate of ideas will result in the wisest governmental policies." And in *Thornhill* v. *Alabama,* 310 U. S. 88, 95, the Court explained the reasons behind freedom of speech and of the press in the following terms:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion * * *.

Economic speech, such as in picketing, also rates high (*Thornhill* v. *Alabama,* 310 U. S. 88), but may be more easily outweighed by competing considerations. *E. g., Teamsters Union* v. *Hanke,* 339 U. S. 470; *Hughes* v. *Superior Court,* 339 U. S. 460; *Giboney* v. *Empire Storage Co.,* 336 U. S. 490; *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722.

Religious expression is one form of speech which is accorded particular protection where other forms of speech or press may not be. The national interest in religious freedom thus justifies the distribution of religious literature, despite the fact that it may litter the streets (*Schneider* v. *State*, 308 U. S. 147; *Murdock* v. *Pennsylvania*, 319 U. S. 105, and companion cases), whereas commercial circulars could be restricted for that reason (*Valentine* v. *Chrestensen*, 316 U. S. 52). Again, there may be greater freedom to use a sound-truck for religious expression (*Saia* v. *New York*, 334 U. S. 558) than for music (*Kovacs* v. *Cooper*, 336 U. S. 77).

Commercial speech, as indicated by *Valentine* v. *Chrestensen, supra,* rates substantially lower. Those members of the Court who have dissented from the Court's action in upholding certain restrictions have indicated that they would accord less protection to speech devoted to "selling pots" than that devoted to distributing magazines. *Breard* v. *Alexandria*, 341 U. S. 622, 650.

Near the bottom of the scale are epithets, and insults. A unanimous Court found that they were "no essential part of any exposition of ideas" and entitled to little consideration. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572.

Such a scale, indicated by the prior decisions of this Court, suggests the comparative social value in different categories of speech and press. Depending upon the content of the speech, a greater or lesser public interest may be required to justify a restriction.

3. THE OBSCENE MATERIAL MADE NON-MAILABLE BY SECTION 1461 HAS A NEGLIGIBLE SOCIAL VALUE

The issue of whether the particular material which formed the basis of petitioner's conviction is obscene or not is not before the Court, in view of the limited grant of certiorari. That material must be considered to be obscene, and the validity of the statute tested on that basis. Indeed, in view of the broad question as to the First Amendment which the Court has agreed to consider (*supra*, p. 2), it is believed that in considering the statute as against the First Amendment the Court should weigh the social value, if any, of all the material falling within the statutory definition of "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture * * * or other publication of an indecent character * * *." We discuss below, in connection with the Fifth Amendment (*infra*, pp. 95–113), the precision of this definition. We consider here the ideas and values of which society may be depriving itself if such obscene material is banned from the mail.

(a) *The statute as construed was limited to matter "calculated to corrupt and debauch the minds and morals"*

Before discussing the worth of the categories of material affected by the statute, it is well to consider the charge to the jury in this case. These instructions were comparable, we believe, to those usually given in cases under Section 1461.

In response to requests, the court instructed the jury that "the nude in and of itself is not obscene" (R. 29), that things that were "coarse" were not obscene, and that the "whole system, the whole Court

is not a censor" (R. 29). The essence of the charge on what constitutes obscenity was as follows (R. 25–26):

> The words "obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts. The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. "Filthy" as used here must also relate to sexual matters. It is distinguishable from the term "obscene," which tends to promote lust and impure thoughts. "Filthy" pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion.
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by

present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

(b) The types of material made non-mailable by Section 1461

The abstract civil liberties issues of free speech and freedom of the press discussed by petitioner are seen in a new light when one examines the material actually caught in the net of the federal obscenity statute. The constitutionality of the statute cannot be considered without some understanding of the day-to-day problem with which it is dealing; the restraint cannot be weighed without knowing what is being restrained—what is the obscenity being sent through the mails.

We strongly urge that it would be a grave mistake to judge current obscenity by the cases which have reached the appellate courts, or which have been *causes célèbres* in the past. *"Ulysses"* and the *"Memoirs of Hecate County"* are not typical.[22] The typical piece of obscenity covered by the statute is far different from those works, far more indisputably pornographic. The validity of the statute must be judged by this mass of "hard core" pornography which, as we shall now show, is its main objective and its major catch.[23]

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[22] Of the 175 convictions for violation of Section 1461 during the fiscal year 1956, 166 defendants pleaded guilty.

[23] So that the Court and other counsel in this and the related cases may have a better understanding of the operation of the statute, the Government has filed, under seal, with the Clerk a substantial volume of material which came into the Government's possession under Section 1461. This represents a fair

The commercial obscene material which is made non-mailable by Section 1461 may be divided, roughly, into three categories.[24]

The first category is that which raises the most concern among authors, publishers, and others specially interested in civil liberties. These are novels of apparrently serious literary; intent, sometimes skillfully written. They are caught by Section 1461 because they concentrate on explicit discussion of sex conduct in a vocabulary based on four-letter words—and the like. Perhaps the most literary of these novels would be typified by Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn*. There are not many such books. All together they probably constitute less than 2% of the items for which persons are convicted under Section 1461.

The second category of commercial obscene material which sometimes runs afoul of Section 1461 is in the borderline entertainment area. This material is produced by persons who operate quite openly, with fixed addresses, and known places of business. The bulk of it is in the form of magazines running from the slick to the pulp. These usually consist of cartoons, short stories, photographs, and drawings. The problem usually arises in connection with the photographs.

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sample of the pornography for which persons are convicted under Section 1461. It is estimated that 90% of the published or commercially reproduced material—that which might be called "press"—which is involved in convictions under Section 1461 is comparable to that filed.

[24] We omit personal, non-commercial, pornography—obscene private letters and postcards, individual or family photographs which are obscene, etc.—which is regularly sent through the mails.

Each magazine hopes to stay on the legally acceptable side of obscenity but is competing with others to be the most suggestive magazine available on the newsstand. To do so, models are posed in different degrees of undress and in increasingly provocative positions. There is an unlimited range of poses from the "arty" to the pornographic and it is impossible in the field of photographs to have a clear and sharp line between what is obscene and what is not (See *infra*, pp. 103–105). Although there will be close cases wherever the line is drawn, it is difficult to see a high social value or "idea" content in such photographs. The nudist magazines raise a similar problem of borderline cases.

Another kind of publication in the borderline entertainment area is the sort with which petitioner in this case has been associated over the years (Pet. Br. 5–6).[25] These are publications of individual works, or more usually selections or chapters from various writers, which have an erotic interest but may or may not be pornographic. Typically this may contain a collection including a work which, because of its age, might be called a "classic", some poetry, some pseudo-scientific discussion of sex habits, etc. Sometimes, such a book or magazine is so concentrated on explicit discussion of sex that, taken as a whole, it is found to be obscene. Such written material, however, would constitute a very minor percentage of the material

[25] Petitioner has also been concerned with the distribution of magazines and other materials, such as Wallet Nudes, French Nudes at Play, Stereoptic Nude Show, 2 Undraped Stars, Good Times, Chicago Sex-Dimensional Issue, Photo and Body, etc., all of which were found by the jury not to be obscene (R. 2–20).

for which persons are prosecuted under Section 1461. All told, this "borderline" category, consisting primarily of photographs, accounts for less than 10% of the seizures under the customs statute or the convictions under Section 1461.

The third, and by far the largest, category of all material which is made non-mailable by Section 1461 is the purposeful "black-market" or "hard core" pornography. This is commercially-produced material in obvious violation of present law. The distinction between this and the material produced by petitioner and others, as discussed above, is not based upon any difference in intent. Both seek to exploit the erotic market place. The difference is that the "black-market" traffickers make no pretense about the quality and nature of the material they are producing and offering. This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudo-scientific or "arty" terms. The production is plainly "hard core" pornography, of the most explicit variety, devoid of any disguise.

Some of this pornography consists of erotic objects. There are also large numbers of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple, explicit, words of sexual excesses of every kind, over and over again. No one would

suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of "comic books", specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted. The booklets "Nights of Horror" involved in *Kingsley Books, Inc.* v. *Brown,* No. 107, are described by the trial judge in that case (R. in No. 107, at pp. 52–54). These pamphlets, which run from 70 to 96 pages, are probably longer than most in circulation and perhaps somewhat more brutal than the average, but the judge's description accurately conveys the quality of this type of purposeful pornography. It may safely be said that most, if not all, of this type of booklets contain drawings not only of normal fornication but also of perversions of various kinds.

The worst of the "hard core" pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective.

Roughly 90% of the printed and photographic material supporting convictions under the Post Office statute are of this "hard core" type. Mr. Huntington Cairns, who has advised the Treasury Department

for over 23 years in connection with all seizures under its statute (19 U. S. C. 1305 (a)) (see Chafee, *Government and Mass Communications* (1947), Vol. 1, Chapter 12, pp. 242-275), estimates that "easily 90%" of all items seized by customs officials are "hard core" pornography. Certainly, this type of material would be sent freely and widely through the mails if it were not for the penalties of 18 U. S. C. 1461. Only legal prohibitions stop it now, and the absence of sanctions would open the gates wide.

(c) No idea of any value is denied a hearing by the barring of obscenity

The obscene material we have just described, which is now barred from the mails, does not, for the most part, contain "ideas" at all. With few exceptions it is produced solely for, and produces solely, an erotic effect. In fact, the only "idea" which could be said to be contained in "hard core" pornography is that there is pleasure in sexual gratification by any and every means, without regard to religious or moral teachings, legal prohibitions, the requirements of sound mental and physical health or the proprieties of a civilized society. Occasionally this is made explicit by a direct invitation to debauchery. The social value of such notions is, of course, nil. And to the extent that the "idea" is the advocacy of prohibited sexual conduct, such advocacy is entitled to no more protection than advocacy of polygamy, which the Court has held may be prohibited. *Davis* v. *Beason,* 133 U. S. 333, 342, see *infra,* p. 52.

Chafee has observed (*Government and Mass Communications*, Vol. 1 (1947), 56:)

> Profane and grossly indecent matter does not form an essential part of an exposition of ideas, and it has a very slight social value as a step toward truth. Those are the interests which we normally consider in advocating freedom of speech, but they play practically no part here. They are clearly outweighed by the social interest in the peace of mind of those who hear and see. Words of this type offer little opportunity for the usual process of counterargument.

Moreover, if there were any valuable ideas in the obscene material which is now denied the use of the mails, those ideas could be easily and freely communicated by wearing a different garb. In considering the value of the obscene material which is now restricted, one must take into account the ease with which any *ideas* that are now being limited could easily be circulated if the author chose a different form.

No idea, as such, will make a book or article obscene. We need not consider the ghosts of past censorship raised by appellant in No. 107 (Br. p. 78). Any subject—sexual or otherwise—can be appropriately discussed in detail, if communication of ideas is the object. The Kinsey books illustrate that ideas and comment on current sexual morals may be freely printed and freely circulated.[26] There may well be

[26] Open advocacy and incitement to incest or rape might be restricted, as is advocacy of murder, but not on the theory that the idea was obscene.

value in commenting on present moral or sexual standards and in helping society move toward better standards, in the never-ending search for improved social values. But these ideas can surely be conveyed without the use of obscenity. Those who believe that nudism or free love or some other panacea may be the cure to present tensions are free to say so, provided the ideas go abroad in decent dress. To stand naked on a soap box in a public square urging listeners to join a nudist colony is an exercise of free speech, but no invalid restraint is imposed if the speaker is required to put on a pair of pants.

The Rules and practice of this Court furnish an illustration of our thesis that ideas, whatever they are, can always be advanced with propriety. The Rules require that:

> Briefs must be * * * free from * * * scandalous matter. [Rule 40 (5).]

This may prevent counsel from shocking the Court in certain ways; it certainly would be construed as imposing a restriction on the vocabulary with which ideas might be advanced.[20a] But we suggest that it never occurred to the Court that this restriction would prevent counsel from advancing *ideas*, and the rule has had no such effect. We do not imply, of course, that Congress could automatically impose on everyone the same restrictions as the Court imposes on counsel, but we do suggest that, insofar as the communication

[20a] "Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners * * *" as quoted in Black's Law Dictionary (3d ed., 1933), p. 1583.

of *ideas* is concerned, the Court's practice shows that it can always be done in decent form.

C. The public interest served by the restriction—The preservation of public morality is of fundamental importance, and would be seriously affected by the distribution of the material made non-mailable by Section 1461

The second factor which must be weighed when considering a restraint upon speech or press is the public interest which that restraint serves.

Petitioner argues that the only speech which can be restrained is that which directly induces wrongful conduct. It is clear, however, under the decisions of this Court, that the public interest to be weighed against the interest of absolute free speech is not limited to the prevention of harmful *conduct* by the hearer or reader. The maintenance of public morality is of major interest to society and a proper basis for legislative action.

Moreover, if it is applicable to a conflict between the interest in the "ideas" circulated in obscene material and the interest in public morality, the clear-and-present-danger test requires only that there be a substantial possibility of harm to the latter interest. And the distribution of obscene material does create a serious risk of directly inducing criminal and perverted sex conduct. It also creates a serious risk of inducing such conduct over a period of time by breaking down the moral standards of the community. Also, like epithets or libel, the obscene material may itself cause direct psychological injury to individuals.

Finally, open flouting of the moral code of the community as to the circulating of pornography weakens the moral sanction behind other laws upon which, in the last analysis, they depend.

1. THE PUBLIC INTEREST WHICH MAY JUSTIFY A RESTRAINT ON FREE EXPRESSION IS NOT LIMITED TO THE PREVENTION OF CONDUCT

The keystone of petitioner's argument is that no speech can be restricted except that which induces illegal conduct by the hearer. Petitioner states (Pet. Br. 33–34):

> Consequently in order to sustain the instant obscenity statute, the government has the burden of demonstrating that allegedly obscene literature seriously and imminently causes wrongful action or conduct * * *

We believe, as discussed below (*infra*, pp. 54–60), that there is substantial ground for believing that distribution of obscene materials does contribute directly to immoral conduct, and certainly it creates a risk of doing so in a field where no one can be certain. But, in any event, petitioner is wrong in assuming that the only public interest which can justify a restriction on the press is the interest in suppressing criminal or harmful *conduct*. As this Court has shown, society has a great many interests which may justify restrictions on freedom of speech or of the press other than preventing wrongful conduct that might be induced by the speech.

In *Teamsters Union* v. *Hanke*, 339 U. S. 470, the Court held that peaceful picketing could be barred by a state where it conflicted with the state's policy of

encouraging small, self-employed businesses. There was no suggestion that the speech involved, which in effect urged persons not to patronize a particular store, would cause the potential patrons to engage in some "wrongful conduct", which the state could prohibit. On the contrary, the speech might persuade them to do something they were perfectly free to do—refuse to buy at the store. The damage was to a general social policy of the state to keep small, self-employed persons in business, a policy which is certainly less strongly held than views as to public morals.

In *Prince* v. *Massachusetts,* 321 U. S. 158, the public interest being weighed against unrestricted free speech was that of keeping children off the public streets. The Court held valid a state statute prohibiting a boy under 12 or a girl under the age of 18 from selling periodicals on the public streets even though the speech involved was religious in content. Here again, the restriction on the distribution of printed matter was justified not because the words involved incited to prohibited conduct but because the distribution itself conflicted with predominant social and moral interests of society.

The interest of society in the cleanliness of its streets is itself sufficient to justify a restriction on the distribution of printed matter where the content, such as that contained in a commercial handbill, is of no great value. *Valentine* v. *Chrestensen,* 316 U. S. 52. It is not that the commercial advertising will induce people to engage in conduct which may be prohibited. It is simply that such distribution of

printed matter of that type conflicts with the social interest in keeping the streets clean, and that society's interest in cleanliness is greater than in the distribution of printed matter which has no more social utility than a handbill explaining where the public may see a submarine. On the other hand, distribution of religious tracts may have to be permitted (*Schneider* v. *State*, 308 U. S. 147).

The interest of a town in the orderly and convenient use of its streets may justify a restraint on the manner and time in which the streets can be used for public expression of views. *Cox* v. *New Hampshire*, 312 U. S. 569. Despite the differing views expressed by members of the Court in *Kovacs* v. *Cooper*, 336 U. S. 77, on the scope of the Trenton, New Jersey, ordinance dealing with the use of sound trucks, there was unanimous agreement that a community's interest in quiet was sufficient to justify regulation of the time, place, and volume of the sound permitted.

In *American Communications Association* v. *Douds*, 339 U. S. 382, 397, 398, the Court reviewed some of the competing interests which justified restrictions on First Amendment rights:

> But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation. When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing

of imminent danger to the security of the Nation is an absurdity. * * *

On the contrary, however, the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. We have noted that the blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), or of the whole community, *Jacobson* v. *Massachusetts;* 197 U. S. 11 (1905), and it may be offensive to the moral standards of the community, *Reynolds* v. *United States,* 98 U. S. 145 (1878); *Davis* v. *Beason,* 133 U. S. 333 (1890). And Government's obligation to provide an efficient public service, *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), and its interest in the character of members of the bar, *In re Summers,* 325 U. S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment. And see *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 499–501 (1949). We have never held that such free-

> doms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox* v. *New Hampshire, supra* at 574.

In referring to the "evils of conduct", the Court did not limit legislators to the conduct which the speech was urging, but also included conduct involved in the very exercise of the First Amendment rights, such as the use of a sound truck. In this context, the putting of pornography in the mail is the "conduct" which society may prevent if, on balance, the interests in prohibition outweigh those favoring free distribution. The public interest being served is not limited to the prevention of wrongful action on the part of those who receive the pornography through the mails.

2. THE CLEAR-AND-PRESENT-DANGER TEST, IF APPLICABLE HERE, REQUIRES ONLY THAT THERE BE A SUBSTANTIAL DANGER THAT A STRONG COMPETING SOCIAL INTEREST WILL BE INJURED UNLESS THE RESTRICTION IS IMPOSED

The Due Process clause requires that there be some reasonable relationship between legislation and the purpose which it was designed to serve. With regard to First Amendment freedoms, a more rigorous test has sometimes been demanded, which has generally been referred to as the standard of "clear and present danger". There is no need here to review the development of the doctrine nor what it has meant to

different individuals at different times. We do not here have political, religious, or economic speech with which the "clear and present danger" test has been associated. See, *e. g., Schenck* v. *United States,* 249 U. S. 47; *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357; *Dennis* v. *United States,* 341 U. S. 494.

For the purposes of non-political speech of a low order, like obscenity, what is involved is the comparative relationship between the speech or press that is restrained and the interest which will be injured if it is not limited. The social interest being served by the restraint must, of course, be substantial. Whether it be referred to by the phrase "clear and present danger" or not, the injury to that social interest must be probable and grave if the speech is not restrained. Where the competing social interest will obviously be directly affected, the Court has not usually spoken in terms of "clear and present danger", though the rulings can be phrased in those terms. Epithets can be said to create a clear and present danger of a breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Passing out handbills creates a clear and present danger of littering the streets. *Valentine* v. *Christensen,* 316 U. S. 52. A loud and raucous sound truck creates a clear and present danger of disturbing the peace and quiet of a community. *Kovacs* v. *Cooper,* 336 U. S. 77. And a solicitor at the door creates a clear and present danger of disturbing the privacy of the home. *Breard* v. *Alexandria,* 341 U. S. 622.

The short of it is that the "clear and present danger" concept adds little to the consideration of

those non-political cases where there is a direct injury to an important social interest. In such a case, the true issues are only whether the competing public interest is a strong one and whether it will be injured unless the restriction is imposed.

3. THE PRESERVATION OF PUBLIC MORALITY IS OF MAJOR INTEREST TO THE COUNTRY AND A SOUND BASIS FOR LEGISLATION AGAINST OBSCENITY

The prime social interest violated by pornography, particularly commercial pornography, is the interest in maintaining public morality. The protection of public morality has pervaded state and federal action and has been time and again affirmed by this Court as a basis for legislative action.

In 1879, the Court validated a statute of Mississippi making lottery a crime. Chief Justice Waite wrote that "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants." *Stone* v. *Mississippi*, 101 U. S. 814, 819. See also, for recognition that lotteries may be condemned by the state legislatures as a means of protecting public morals, *New Orleans* v. *Houston*, 119 U. S. 265; *Douglas* v. *Kentucky*, 168 U. S. 488. In *Booth* v. *Illinois*, 184 U. S. 425, the Court upheld a state statute forbidding contracts for options to buy grain at futures, on the ground that the Court has no authority to interfere unless the statute has no "real or substantial relation" to the protection of public morals. *Id.* at 429. A comparable limitation on business activity by the state, in protecting public morality, was upheld in *Otis* v. *Parker*, 187 U. S. 606, involving a California

statute invalidating contracts providing for the sale of shares of stock in any corporation, on margin, or to be turned over in the future. Authority to preclude gambling as inimical to public morality has also been affirmed. In *Marvin* v. *Trout*, 199 U. S. 212, involving an Ohio statute permitting any one to sue to recover money paid as a gambling debt, the Court recognized that gambling was generally regarded "as a vice to be prevented and suppressed in the interest of the public morals and the public welfare." 199 U. S. at 224. For similar approval of state authority to control and limit gambling techniques as a protection of public morals and welfare, see the *Trading Stamp Cases: Rast* v. *Van Deman & Lewis*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369; *Pitney* v. *Washington*, 240 U. S. 387.

Again, the broad authority to foster and uphold public morality was recognized with respect to the liquor traffic. Early, a license requirement for the sale of spiritous liquors was sustained in the interest of the public welfare, in the absence of federal legislation. *License Cases*, 5 How. 504. Cf. *Bartemeyer* v. *Iowa*, 18 Wall. 129, sustaining a statute prohibiting the manufacture of intoxicating liquor for ordinary consumption. And for the principle that state authority concerning liquor prohibition derives from the police power of the states to protect public morality, see *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen*, 137 U. S. 86; *Crane* v. *Campbell*, 245 U. S. 304; *Samuels* v. *McCurdy*, 267 U. S. 188; see also *Van Oster* v. *Kansas*, 272 U. S. 465; *Eiger* v.

Garrity, 246 U. S. 97; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192. In *Murphy* v. *California*, 225 U. S. 623, 628–630, the Court upheld a California ordinance prohibiting, except in certain specified cases, the maintenance of any billiard hall or pool room. "Blue sky" laws have met with judicial approval as being a proper exercise of that authority of the states to protect their citizens from spurious business practices. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 551; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559; *Merrick* v. *Halsey and Co.*, 242 U. S. 568.

The close connection between concepts of public morality and governmental authority, illustrated by all of the foregoing cases, was graphically stated in *Trist* v. *Child*, 21 Wall. 441, 450:

> The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong.

This concept that government has, as one of its essential obligations, the preservation of public health and morality is not limited to the states, but has also been recognized as a duty residing in the federal government. The federal police power in the field of interstate commerce seeking to protect public morality has long been beyond dispute. In *Hoke* v. *United States,* 227 U. S. 308, the constitutionality of the White Slave Traffic Act, 36 Stat. 825, was upheld as within the commerce power of the federal government and as a definite means of upholding basic uniform concepts of public morality. And in *Caminetti* v *United States,* 242 U. S. 470, 491, the Court noted that:

> the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

See also *Champion* v. *Ames,* 188 U. S. 321, 355 (the lottery case).

In *Davis* v. *Beason,* 133 U. S. 333, 342, the validity of a statute of the territory of Idaho denying the franchise to any one who taught bigamy or polygamy was upheld against the challenge that it violated the freedom of religion and speech:

> It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. * * *

Similarly, in *Ex parte Jackson,* 96 U. S. 727, the Court sustained a statute prohibiting the use of the mails for lottery circulars, against a challenge relying

on the First Amendment, under the concept of public morality. See, in accord, *Public Clearing House* v. *Coyne,* 194 U. S. 497; *In re Rapier,* 143 U. S. 110. Cf. *Donaldson* v. *Read Magazine,* 333 U. S. 178, 191, where the unanimous Court, speaking through Mr. Justice Black, affirmed the *Coyne* case, *supra,* and observed:

> None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress to use the mails for perpetration of swindling schemes.[27]

4. PUBLIC MORALITY WOULD BE SERIOUSLY AFFECTED BY THE DISTRIBUTION OF OBSCENE MATERIAL

Against the negligible social value of obscene and pornographic material must be weighed that group of society's interests which are grouped together under the name of public morality. The major importance of these interests, taken collectively, cannot be doubted, and, as we have just shown, has been repeatedly confirmed by the Court. The question here is as to the ways in which these interests would be adversely affected by the distribution of the obscene material now barred from the mails by Section 1461. The answers to that question supply the themes for the following discussion.

[27] For a valuable discussion of the importance which public morality has played in the prior decisions of this Court and additional cases bearing on the point, see Whelan, *Censorship and the Constitutional Concept of Morality,* 43 Georgetown Law Review 547 (1955).

(a) The distribution of obscene material creates an increased risk of immediate criminal and immoral conduct

(i) As Judge Frank pointed out in his concurring opinion below, there are differences of views as to the extent of the influence which pornographic material may have in inducing criminal conduct. No one knows the extent to which rape and other sex crimes are caused by the limited pornographic material now available. Even less do we know the precise extent to which such crimes would be caused were existing governmental restrictions on the publication and distribution of such materials removed and were there easy access to the type of pornographic materials we have described above (*supra*, pp. 34–39). But there can be no question that *some* instances of criminal conduct have been a consequence of pornographic materials, and that their distribution does create a risk. Experts may differ as to the extent of the risk, or the precision of our knowledge, but that there is a risk is beyond dispute.

Petitioner seems to suggest that, unless the Government can prove fully that recipients of obscene material will probably put down the material and go out and commit a rape or other immoral act, then the material must be given unlimited circulation. But Congress is not confined to the narrow area of undisputed scientific proof by modern students. With an age-old problem like obscenity, Congress can draw upon historical experience, common knowledge and the views of those who deal with the problem day-by-day—at least until this common fund of knowledge and understanding is clearly proved to be without any founda-

tion (a conclusion which no one claims has yet been reached by any student).

Since sex conduct is caused by the reaction of a particular individual to a large mass of things to which he has been exposed, there cannot now be proof positive of the part that any one element played. All that can be done is to make an estimate as to whether pornographic material, turned loose in society, is likely to play a substantial part in bringing about illicit sex conduct. That estimate has been made, and it cannot be said to be unsupported.

In the first place, when one realizes that the bulk of the material banned from the mails as obscene is pure commercial pornography, illustrated with photographs and explicit drawings of all forms of sexual conduct and perversion, it would be surprising if it did not cause many of its recipients to experiment. The fact is that pornography is frequently shared, making it even more likely that two or more persons will be tempted into trying the various forms of immoral conduct that are described so glowingly and illustrated so profusely. In particular, the correlation between pornography and perversion is too close to believe that the first has no causal connection with the second.

At the Hearings before the House Committee on Post Office and Civil Service, 83d Congress, 2d Session on H. R. 569, "A Bill to Authorize the Postmaster General to Impound Mail in Certain Cases", Inspector Ray Blick of the Metropolitan Police Department, in the District of Columbia, testified to this close connection (Hearings, p. 22):

> Mr. JOHNSON. * * * Inspector Blick * * * whether in your mind there is a connection between this growth in pornography and obscenity, much of which materials come through the mails, according to your testimony, and the increase in sex crimes?
>
> Mr. BLICK. That is a hard question to answer for lots of reasons. We do not know what is in the mind of the individual who buys this material so the only way we could answer that would be that around 75 percent of the perverts, those that are taken into custody, where we are fortunate enough to get in their apartments, and in those cases it is nothing for us to seize from 1 to 20 books of pornographic material.

In the Report of the Select House Committee on Current Pornographic Materials, 82d Congress, 2d Session. (H. Rep. 2510), the police commissioner of Chicago was quoted as saying that the recent increase in sex and rape crimes was directly attributable to the influence of lurid magazines and comics. If he was referring to the non-pornographic material, pornography of the type we have described would appear to be an *a fortiori* case.

Donald S. Leonard, Chairman to the Conference of International Association of Chiefs of Police, reported to the Select House Committee referred to above (H. Rep. 2510, p. 114):

> The problem of obscene and pornographic writings, drawings, and photographs has been developing new proportions * * *. The effect has been that, their curiosity and excitement aroused, many have explored sex and indulged

> in its experiences with all the consequences that so often follow immoral conduct and promiscuity. The influence of salacious material upon vulnerable individuals is such that every effort should be made to impede and stop its circulation * * *

And J. Edgar Hoover has said:

> The increase in the number of sex crimes is due precisely to sex literature madly presented in certain magazines. Filthy literature is the great moral wrecker. It is creating criminals faster than jails can be built.[28]

Laymen also share in the general belief:

> And I may insert here that perhaps one reason for the city of Atlanta to become so aroused was the death of a little boy caused by one of the hideous sexual offenses believed to have been induced by the reading of obscene literature.[29]

Such opinions are not to be taken lightly. There is, at the very least, a substantial chance that they are right, and that increased distribution of pornography would cause increased perversion and other sex offenses, and increased illegitimacy. Congress, the various state legislatures, and the other countries of the world, have all acted on this substantial belief. It cannot be dismissed out of hand as invalid or incorrect. There is therefore adequate justification for

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[28] Quoted in Harpster, *Jurisprudence, Obscene Literature*, 34 Marquette Law Review 301, 302.

[29] Dr. Joseph M. Dawson, Executive Director, Joint Committee on Public Affairs for the Baptists of the United States, Hearings before the House Committee on Post Office and Civil Service, 83d Congress, 2d Session on H. R. 569, p. 8.

the view that the distribution of obscene material through the mail does create a substantial direct risk of immoral conduct. The present statute could be supported on this ground alone.

(ii) Both Judge Frank's opinion below and the briefs submitted in these cases for petitioner, appellants, and the various *amici curiae* refer to some sociological material discussing the causes of crime and delinquency. These are cited apparently to suggest that there is little danger in allowing pornography to be freely circulated. As pointed out above, Congress would not be required to accept the controversial views of these few students, but in any event an examination of their studies will show that they do not support the conclusion advanced in the opposing briefs.

That existing delinquency has not primarily been caused by pornography speaks as much for the effectiveness of the existing restraints as anything else. And most of the sociological discussion concerns comic books, television programs, crime stories, etc. None of it was directed, we believe, to the "hard-core" pornography with which the statute is principally concerned. No student or expert is cited to support the proposition that the distribution of this latter type of obscenity does not create a substantial risk of directly inducing prohibited sex conduct.

(iii) In this connection, it is pertinent to note that the problem of minors is particularly significant for a mail statute. It is possible to ascertain whether you are selling to a minor face-to-face, but not when sending out material through the mail. With the

mail, as with the public display of obscene material, it may be that adults must be deprived of the opportunity to see obscenity solely in order to protect children. See Section 143 of the Michigan Penal Code quoted in the footnote to the Court's opinion in *Butler* v. *Michigan*, 352 U. S. 380, 383, and referred to by the Court as a statute "specifically designed to protect * * * children against obscene matter". We discuss the general question of broadness in connection with the Fifth Amendment (*infra*, pp. 95–99), but, when considering the probable consequences of the circulation of obscenity through the mail, the effect on minors must be taken into account.

(b) The distribution of obscenity creates a substantial risk of inducing immoral sexual conduct over a period of time by breaking down the concept of morality as well as moral standards

Aside from the risk of immediate criminal conduct that is created by pornography, there is the long-run effect on conduct. That pornography could have only an eroding effect on the concept of morality and on moral standards is clear. A large portion of the pornographic material now seized in the mails consists of pictures and stories of fornication and abnormal sexual relations among persons who are not married. Typically, in such material a young woman or young man, or a girl or boy, who has been abiding by the moral code is held up to ridicule—and eventually joins in the "fun". Another common feature in such stories is that the girls must be overcome by force the first time, but once that has happened they will gladly engage in sexual relations with anybody.

The common circulation of such material could hardly help but induce many to believe that their moral code was out of date and that they should do what, they suppose, others are doing.

The conduct with which we are concerned need not be that which would immediately follow the reading of one book, the seeing of one pornographic moving picture, or the study of a set of photographs. Just as in the *Dennis* case, the feared conduct may be the result of repeated indoctrination. The charge to the jury in this case, and in the typical case under this statute, required a finding that the matter "must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall" (R. 25). The statute thus is designed to reach that obscene material which may not induce immediate conduct but which is likely to corrupt the morals. Once moral standards have been corrupted, one's conduct is no longer guided by them. It requires little judicial notice to know that one whose morals have been corrupted is likely to engage in sex conduct which society has a right to prohibit. In this slower but no less serious way, obscenity brings about immoral conduct.

(c) With obscene material, like libel and epithets, the words or pictures themselves cause a direct psychological injury

Pornographic material offends the vast bulk of the population. Whether or not the words and pictures involved may lead to future conduct, the arrival of an obscene circular through the mails upsets, offends, and causes unpleasant emotions in the minds of many of

those who would receive it. One of the interests of public morality is to protect residents from this offense and this direct psychological assault.

Certainly, pornography is as offensive to most people as epithets. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–2; *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310. The extent of the injury would depend, of course, upon the form of the obscenity and the manner in which it reached the house,[30] as well as upon the susceptibility of the recipient. One can easily imagine any number of emotionally harmful situations. The mails being as important and universally used as they are, it is plain that they furnish one of the easiest and most powerful means of inflicting such psychological injury; and such injury through the mails is particularly difficult for the recipient to guard against. As the Court has said in a not too dissimilar context, feelings may be engendered "that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education*, 347 U. S. 483, 494.

The interest in protecting the public from such offense is indubitably genuine and substantial. The harm cannot be dismissed by the suggestion that obscenity is in the realm of ideas, not conduct.

(d) The public has an interest in protecting the privacy of the home from invasion by pornography

There is also a comparable social interest in protecting the home and family against disturbance. "The

[30] 18 U. S. C. 1464 imposes criminal penalties for the utterance of "any obscene, indecent, or profane language by means of radio communication * * *"

police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs* v. *Cooper*, 336 U. S. 77, 83. The strong social interest in preserving the privacy of the home is so great that it may justify restrictions on the distribution of periodicals with a worth-while content entitled to First Amendment protection. *Breard* v. *Alexandria*, 341 U. S. 622. With the mails, as we have suggested, the problem is even more pressing. Although there may be difficulties, the homeowner can post a sign prohibiting the solicitor and inviting the guest. But the United States mails must come through. There is no practical way in which the homeowner can selectively prohibit the unwelcome material in the United States mail from that which is desired. If the homeowner is to receive any mail in his house, he must receive all matter on which the postage has been prepaid.

If there is a social interest against having the privacy of the home disturbed by the ringing of the doorbell, there is a like interest against having the home invaded by pornography. No doubt most families would prefer the occasional magazine solicitor to the daily risk that the mail to which all members have access would contain obscene circulars offering pornography for sale.

Young children as well as adolescents look at the mail; it is a practical impossibility to have parental censorship over all letters before they are read by others in the household, even assuming that there were no legitimate concern in protecting parents, young and old, from pornography. Advertisements may

be sent by first class mail[31] addressed directly to a child or other susceptible person.

As illustrated in this case, the advertising circulars are frequently worse than the promised obscenity. The counts on which petitioner was convicted primarily involved advertising circulars which the jury found to be obscene. The jury failed to convict as to publications which were advertised by the circulars.

The home into which such material would flow is the center of moral training. Within the home, parents try to bring up a family—imbue the children with moral standards by which to guide their lives, and instill in them spiritual values to control their actions and conduct not only during childhood but throughout their adult lives. It is onto this home ground which petitioner claims a constitutional right to inject his commercial obscenity—those publications which play up the illicit, the perverted and the immoral, and which a jury unanimously found would be likely to corrupt the morals of the average person in the community. Whatever restraints society may impose elsewhere, it must have the right to protect the moral training ground of its succeeding generations and to aid parents in keeping the home free from the forced invasion of agencies which will tend to destroy and subvert that training.

Congress has no greater constitutional power over privately owned and operated television stations than it has over the United States mail. Yet no one would suggest that society would constitutionally have to

[31] Circulars on which petitioner was convicted were sent by first class mail.

allow an exhibition on television of naked persons or of carnal intercourse, open to view by the whole family, including children and adolescents. There is clearly a special family interest in protecting the privacy of the home from the intrusion of obscenity, whether by television, by radio, or by the mail chute or letter box.

There is an even more personal family injury occasioned by crude and salacious pornography of the type which is now banned. As between a husband and wife in love there is nothing more special, and more full of wonder, than their intimate life together. With or without a religious significance, it has a high spiritual aspect. It is something above and apart, strong and overwhelming, yet at the same time delicate, precious, and private. Yet this is the subject which pornographers would illustrate and describe in the grossest and most disgusting form. It makes no difference that the photographs are of others, or that the advertising circulars received in the mail are thrown away. One's own privacy cannot withstand an onslaught calculated to debase and pervert in the public eye something so close to that which had been personal. It would be hard to remain unaffected. What was special would, at least for many, tend to become sordid.

(c) *Circulation of obscene material weakens the fundamental fabric of public morality*

One thrust of petitioner's argument appears to be that the general interest in sexual morality, specifically the moral interest against the distribution of obscenity, is not great—that this aspect of public

morality can be safely corrupted without harming the whole fabric. But public morality is more than a set of manners or even a code of unrelated rules. It is the element of "ought" that lies behind the laws and rules of an organized society. The collective public conscience pushes the individual in the direction of being honest, fair, law-abiding, and decent. While separate elements may sometimes be singled out, public morality is really indivisible, in the sense that one aspect of it cannot be corrupted and leave the rest unaffected.

We have discussed above the risks, which must be admitted, that circulation of pornography will lead, either directly or gradually, to immoral sexual conduct. But morality is more fundamental than rules as to sex conduct. The entire willingness of a society to be governed by rules—to do those things which it ought to do—depends upon a close correlation between those rules and the public conscience. The public morality of a nation may be compared with the morale of a fighting force. The willingness of one citizen to abide by the demands of those rules which apply to him depends upon his knowing that in general others are abiding by the community standards which govern what they ought to do. The man who finds that the Government will or can do nothing to stop the distribution of pornography to his family will be less willing to abide by society's demands on him, whether it be as to gambling, distribution of narcotics, or the candor with which he fills out his income tax. Similarly, the corruption of moral standards in the realm of sexual conduct cannot help but corrupt other aspects of moral life. Morality,

like morale, cannot be undercut at one point without affecting all conduct.

There is another factor which must also be taken into account. Public morality is not only the conscience of a country which ensures basic compliance with the laws and social standards of that society; it provides the very objectives for organized society. Governments are organized so that competing interests can be reconciled and those things which "ought" to be shall take place. The gap between the law and the public conscience can never be too great if that society is to continue to operate effectively. If the law is substantially more restrictive than the public conscience dictates, compliance with the law breaks down, with a contagious effect in other areas. On the other hand, if the law fails to provide rules or procedures to cope with a social problem about which people properly feel strongly, those groups which have the strongest views may take the law into their own hands.

There can be no doubt that the public feels strongly that pornography must not be circulated, and properly so. The existence of federal laws and laws in 47 states demonstrates a public concern.[32] The thousands of letters received each year by the Post Office complaining about obscene material currently circulated in the mail also testify to that concern.[32a] Few would doubt that the public feels more strongly about the production and distribution of pornography than it does

[32] Only New Mexico is without legislation directed against the dissemination of obscene material. See *infra*, p. 79.

[32a] As to a single publisher, such as petitioner or appellant in No. 61, the Post Office receives several thousand complaints.

about lotteries (*Ex parte Jackson*, 96 U. S. 727), pool rooms (*Murphy* v. *California*, 225 U. S. 623, 628–630), options to buy grain at futures (*Booth* v. *Illinois*, 184 U. S. 425), gambling (*Marvin* v. *Trout*, 199 U. S. 212), running trains on Sundays (*Hennington* v. *Georgia*, 163 U. S. 299), or many of the other aspects of public morality that have been the basis, at various times, for legislative action. This strong interest has become incorporated in the public conscience and is therefore, in and of itself, a valid reason why governmental power should be used to prohibit the distribution of pornography.

We do not suggest that the existing codes of morality cannot be attacked. They are attacked daily and, partly as a consequence, are everchanging. But the morality which holds society together is fundamental and basic. Morality must tolerate change but it need not tolerate moral anarchy. Those seeking to change the standards of public morality, like those seeking to change the Constitution, may freely do so. Those seeking to change the Constitution must use methods permitted by the Constitution. Those seeking to change the fundamental standards of public morality can similarly limit their forms of expression to those tolerated by present morality. As discussed above (*supra*, pp. 39–42), such a restriction imposes scarcely any restraint on the ideas or arguments which can be used in favor of a different public morality. As the able briefs of petitioner and appellants in these cases illustrate, one may make the strongest possible arguments for unlimited freedom for pornography without being obscene. The requirement that material sent through the mail not be obscene similarly imposes no

appreciable restraint on the arguments or thoughts which can be advanced in favor of different concepts of public morality.

D. The method of restriction—Criminal punishment for abuse of postal facilities is an appropriate limitation to accomplish the statutory purpose

The third factor which must be considered—along with the value of the speech and the public interest served by the restriction—is the method and form of the restraint imposed. We believe that the negligible value of pornography, when weighed against the public interests on the other side, would justify the most inclusive and rigorous of restraints. However, in this case we have to deal only with the criminal provisions of Section 1461 which are plainly appropriate.

1. THERE IS NO QUESTION OF ADMINISTRATIVE DISCRETION OR PRIOR RESTRAINT

This case does not involve the sometimes difficult issues of prior restraint or administrative discretion which arise when administrative agencies have to determine in advance whether certain speech shall be permitted. Rather, we are dealing solely with a criminal conviction pursuant to a statute which imposes criminal penalties for violation of the law for the distribution of particular materials of anti-social content through the mails. Petitioner was convicted upon a post-distribution prosecution before a jury which made the ultimate decision. There was no administrative decision or ruling. The materials upon which petitioner was convicted flowed freely through

the mails." It was only after their receipt that Section 1461 was brought into play as a criminal statute imposing the sanctions of the law upon petitioner for its violation.[33]

Judge Frank, below, suggested that a criminal statute actually imposes a prior restraint. He said: "Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive" (R. 84). He suggests that as "a result, each prosecutor becomes a literary censor (i. e., dictator) with immense unbridled power, a virtually uncontrolled discretion" (R. 85).

We believe that this does not accurately reflect the differences between pre-censorship and a conviction for past conduct. A prior restraint may be bad because of the risk of serious abuse. But where there is no restraint on what one can write or distribute, except that violations of certain standards will be

[33] Although the Post Office employs the standard set out in Section 1461 in the exercise of its administrative authority to determine what shall be permitted to flow through the mails, authority stems not only from that statute but from 39 U. S. C. 259a (see *e. g., Summerfield* v. *Tourlanes Publishing Co.*, 231 F. 2d 773 (C. A. D. C.), certiorari denied, 352 U. S. 912) and from the general authority of 5 U. S. C. 369 to "execute all laws relative to the Postal Service." See *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 416; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158. The administration of the obscenity standard by the Post Office is involved in *Sunshine Book Co.* v. *Summerfield*, 128 F. Supp. 564, reversed, May 31, 1956, rehearing en banc, September 25, 1956 (C. A. D. C.), decision pending, and in *One, Inc.*, v. *Olesen*, No. 15,139, decided February 27, 1957 (C. A. 9).

punished, there is no such possibility of abuse. A man cannot be convicted unless a jury of his peers unanimously agrees beyond a reasonable doubt that he has violated the statutory standard. Decisions are reached in the public eye. Any work can see the light of day. There is no appreciable risk that a work that is fairly on the accepted side of the legislative standard will be suppressed. To suggest that there is no difference between an administrative ruling preventing distribution and post-conduct punishment is to overlook one significant basis on which freedom of the press developed.

The difference between administrative discretion and a judicial decision, where a restraint on the distribution of books is concerned, was one of the key points in the debate on Section 305 of the Tariff Act of 1930, and was emphasized by Senator Black:

> If that literature is contrary to the public sentiment of the States, the individual who brings it into that State can be tried and the jury will convict him. I have no hesitancy in saying that the jury should convict him when literature is so obscene as to be contrary to good morals and decent society. I do say, however, that until he stands and faces a jury of his peers no individual servant of this country ought to be given sufficient power to take away a single leaf or page from his book, nor to put him to one penny's expense.
>
> * * * * *
>
> * * * I am unalterably against any attempt to prevent the distribution of literature so long as the juries in the States, where public sentiment is made, have it within their power to

condemn the distribution of that literature as being deleterious to the morals of their people. [71 Cong. Rec. 4469.]

I would have no objection to this man reporting it to the courts; but in the case of a book which may or may not be bad I do strenuously object to having any customs inspector determine for the public what shall be distributed. Let it be determined by a court.

* * * * *

Oh, I have seen some of them that were printed in this country that would shock the morals of a man who has not been in church for 40 years. There is no question about there being bad books in this country, and bad books that come into the country. * * * The courts provide methods for the prosecution of all cases. This is purely a difference in the method of enforcement of law.

* * * * *

I agree with the Senator that the bad books should not be circulated; but I have an inherent opposition—I presume it comes, perhaps, from reading a great deal of Thomas Jefferson's philosophy—I have an inherent, well-grounded opposition against vesting in the hands of an individual judicial powers on matters of supreme importance with reference to the dissemination of human knowledge. * * *

* * * * *

I want to say this: If the Senator will devise some plan whereby this matter can be determined at the port on some kind of judicial inquiry, I shall be heartily in favor of it.

* * * * *

> So far as I am concerned I prefer to have the rights of American citizens, or people who are here, tried in the courts set apart and dedicated for that purpose, and then make it a crime and impose a punishment for importing indecent books; but do not have the thing tested by a deputy constable, or a deputy sheriff, or a deputy inspector. [72 Cong. Rec. 5418, 5419.]

2. SECTION 1461, WHICH IS APPLICABLE ONLY TO THE CIRCULATION OF OBSCENE MATERIAL THROUGH THE UNITED STATES MAIL, IS NOT TOO BROAD A RESTRAINT TO ACCOMPLISH ITS PURPOSE

Section 1461 cannot be condemned as being broader than its purpose. Its aim is to catch all obscene material that is likely to corrupt the morals of those who receive it. The statute, as drafted and construed, applies only to that class of material, and to none else.

Moreover, the statute does not impose a blanket restraint on all publication or circulation but is limited to that material which is sent through the United States mail. The postal service, particularly the second class mail into which most magazines fall, is a highly subsidized enterprise. Although to say that "the use of the mails is a privilege which may be extended or withheld *on any grounds whatsoever*" would raise grave constitutional questions (*Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156, emphasis added), there can be no doubt that Congress has greater freedom to impose restrictions on what is carried in the mail than it may have in other areas. In *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 411, the Court referred to Congress' power over the mail as "practically plenary", citing *Ex parte Jackson*, 96 U. S. 727; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506,

507; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 313. The dissents in that case by Mr. Justice Brandeis and Mr. Justice Holmes did not question the power of Congress to exclude particular material from the mail, but only whether the postmaster, under the statute, could deny second-class mailing privileges to a newspaper because it had previously printed non-mailable matter. In fact, Mr. Justice Brandeis, in support of his argument, referred four times to the power of Congress to exclude obscene and immoral material from the mail. 255 U. S. at 418, 421, 422, and 430. At the latter point he said:

> * * * The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats or libels. It may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails.

The power of Congress over the mail was specifically recognized in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146. Speaking for a unanimous Court, Mr. Justice Douglas pointed out that the Court had already held—

> that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. [327 U. S. at 155–156.]

and that—

> When Congress has been concerned with the content of matter passing through the mails,

> it has enacted criminal statutes making, for example, obscene material * * * nonmailable in any class. [327 U. S. at 156.]

and again—

> The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. [327 U. S. at 158.]

Access to the mails, and particularly access to the subsidized second class category, is thus somewhere between a right and a privilege. Congress may exclude matter for a good reason if done on a nondiscriminatory basis. Making obscene matter nonmailable is thus not a broad across-the-board restriction but more in the nature of closing a particular, if valuable, avenue of circulation.

There are, to be sure, other federal statutes restricting the distribution of obscene matter in the United States. Such matter may not be imported into the United States or deposited (or taken from) any common carrier for carriage in interstate commerce (18 U. S. C. 1462), or transported in interstate or foreign commerce for the purpose of sale or distribution (18 U. S. C. (Supp. III) 1465). Neither may obscene language be used on any means of radio communication (18 U. S. C. 1464). Each statute must, of course, be considered by itself. The only issue involved in this case is, as stated in the questions on which the Court granted certiorari (*supra*, p. 2), the validity of the provisions of Section 1461 relating to the use of the mails for the circulation of obscene matter.

But even considering the cumulative effect of the different federal statutes, they are not unduly broad since they do not catch anything except obscenity—the precise matter which is within the purpose of the legislation. Further, they do not prevent self-expression or the creation of works of "art" no matter how obscene. The laws limit distribution and circulation, most of which is commercial in nature.

The narrowness of the federal statute must also be judged by the availability of alternative forms of restriction. We deal below (*infra*, pp. 95–113) with the charges of broadness and vagueness under the Fifth Amendment. At this point, we may merely state that no one has suggested narrower restrictions which could accomplish the purpose of Congress. The restriction obviously could not be applied only to certain classes of mail, or only to mail going to certain areas. There is no known way in which the restriction could be applied only to those who are susceptible or addicted to pornography; there is no way of telling in advance who such people are. Society surely does not have to wait until someone has become an addict, been corrupted by the material, in order to lock the gates. And even such a restriction would not meet petitioner's argument since he contends that he is communicating "ideas". Certainly, if this is the justification, it would not help to bar the material from all of those to whom the "ideas" would appeal.

In sum, the restrictions imposed by Section 1461 are narrow; they involve no administrative discretion or prior restraint. The form of the restriction argues strongly in favor of its validity.

E. The weighing of the competing interests, in the light of the values which organized society places upon them, overwhelmingly demonstrates that the social interests served justify the limited restraint upon freedom of the press involved in Section 1461

We have shown above that the content of the speech or press which is restrained is of negligible interest on any scale of comparative value. On the other hand, the numerous social interests summed up in the concept of public morality are of basic importance in the control of conduct, in the protection of privacy, and in the maintenance of the moral respect for law. The restraint imposed by Section 1461 is fully appropriate if these larger social interests are to be served.

We believe that, even if the Court were to judge these competing social interests in the abstract and on the basis of individual judgment, there should be no question but that the statute meets the requirements of the First Amendment. Men's minds and emotions are as much a subject of injury as their bodies, and the risks of injury involved in the distribution of pamphlets on the "joys" of sexual orgies is certainly as great as that of the possible fist-fight justifying the restraint in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

But the Court need not, in fact should not, judge these competing interests in the abstract or solely for itself. Society's interests should be weighed in the light of the comparative value which organized and enlightened society places upon them. This Court must hold the balance and weigh the interests. But the comparative weight which it accords to the interest on

each side of the scale should be appraised in the light of the weight which society gives that interest. And the question of the changing content *within* the concept of obscenity—an issue which is not here at this time—must not be confused with any change in the position which the concept of obscenity has itself held in this or any other society.

1. THE COMPETING INTERESTS HERE INVOLVED HAVE BEEN REPEATEDLY WEIGHED AGAINST EACH OTHER BY THE PUBLIC, STATE LEGISLATURES, CONGRESS AND THE COURTS, WITH THE UNIVERSAL CONCLUSION THAT SEVERE RESTRICTIONS ON OBSCENITY ARE REQUIRED

The competing interests which the Court must weigh have been weighed before. The grant of certiorari in this case must be taken as a decision to reexamine the constitutionality of a statute which has long been assumed. But that decision does not undercut the relevance of the statute itself or of the prior expressions of this Court as indicating the comparative values placed on the interests here at stake. Those views, like those of the states and of foreign governments, are relevant to an appraisal of social values.

(a) All countries restrict obscenity

The universally low value with which obscene material is regarded is perhaps shown no more clearly than in the single statistics of the number of countries which have agreed on joint action to restrain the circulation of obscene material. The International Agreement for the Suppression of the Circulation of Obscene Publications was signed at Paris on May 4, 1910. It entered into force for the United States

on September 15, 1911. 37 Stat. 1511.[34] The following states have become parties to that agreement (Treaties in Force, October 31, 1956, page 209, U. S. Dept. of State.):

Afghanistan
Albania
Australia
Austria
Belgium
Brazil
Bulgaria
Burma
Canada
China
Colombia
Cuba
Czechoslovakia
Denmark
Egypt
El Salvador
Estonia
Finland
France
Germany
Greece
Guatemala
Haiti
Hungary
Iceland
India
Iran
Iraq
Ireland
Italy
Japan
Latvia
Luxembourg
Mexico
Monaco
Morocco
Netherlands
Newfoundland
New Zealand
Norway
Paraguay
Poland
Portugal
Rumania
San Marino
Spain
Switzerland
Thailand
Turkey
Union of South Africa
Union of Soviet Socialist Republics
United Kingdom
United States
Yugoslavia

[34] The agreement has been amended by a protocol signed at Lake Success May 4, 1949, to which many of the above-listed states have become parties, plus the additional states of Ceylon and Pakistan. Department of State, Treaties in Force, October 31, 1956, page 210.

It would be hard to find a comparable issue on which there was such a universal value judgment.

The domestic laws of many of these states dealing with the control of obscenity are analyzed in St. John Stevas, *Obscenity and the Law*, 217–259 (1956).

(b) The United Kingdom, which has been re-examining its obscenity laws, is currently considering the adoption of a law based on the United States standard with additional restrictions as to material which exploits horror, cruelty or violence

For the past several years there has been extended discussion in Britain of the problem of its obscenity laws and the desirability of changing them. See, *e. g.*, St. John Stevas, *Obscenity and the Law*, (1956). On March 29, 1957, the proposed Obscene Publications Bill was read a second time in the House of Commons and referred to a select committee. While this bill has not yet been adopted it does indicate the product of several years' study and contains a suggested balancing of the competing interests of freedom for authors and protection from obscenity which drew support from both parties. Hansard, March 29, 1957, cols. 1493–1583. The proposed Obscene Publications Bill (reproduced in the Appendix, *infra*, p. 120) adopts a position quite close to that set forth in 18 U. S. C. 1461. In fact, the bill would extend by statute the definition of obscene to include any matter which "unduly exploits horror, cruelty or violence".

As a current attempt at finding the proper legislative standard to be applied to obscenity, this British bill demonstrates that in England the judgment is

that the competing societal interests call not for an abandoning of the control of obscenity but rather the extension of control to non-sexual interests.

(c) All but one State in the Union have adopted statutes based on the proposition that the public interest in morality outweighs any value in circulating obscene material

No clearer proof of how the United States weighs the competing societal interests could be asked than that given by the statutes of the various states. Every state except New Mexico has adopted legislation aimed at preventing the publication and distribution of obscene material. Report of the Select Committee on Current Pornographic Materials, H. Rept. 2510, 82d Cong. 2d Sess., p. 32–34. The state legislatures certainly reflect a common judgment as to the high interest in the preservation of public morality and the low value placed on any "idea" content in obscene material

In the light of this Court's often expressed view that the free speech and freedom of the press protected by the First Amendment are part of the liberty protected by the Fourteenth, a decision that Section 1461 was invalid under the First Amendment would seem to require the invalidation of all the state statutes as well.

(d) The Congress of the United States has repeatedly considered the problem of obscenity and repeatedly decided that more rigid restrictions were required

Apparently the first federal restriction was the customs ban against the importation of obscene material in 1842, 5 Stat. 548, 566, which prohibited the importation of indecent prints, paintings, lithographs,

etc. The scope of prohibited matter was broadened in 1857, 11 Stat. 168, which added "articles", "images", "figures" and "daguerreotypes". The Tariff Act of 1890, 26 Stat. 567, 614–615, added "book", "pamphlet", "paper", "writing", "advertisement" and "circular".

In 1865, it was made a misdemeanor to mail an obscene book, pamphlet, etc. 13 Stat. 504, 507. In 1872, the language was revised and broadened to include, among other things, scurrilous epithets on envelopes or postal cards. 17 Stat. 302. In 1873, the section was again broadened (17 Stat. 599); it was revised again in 1876. 19 Stat. 90. In 1888, the mailing of indecent matter on wrappers or envelopes was specifically prohibited in a separate provision. 25 Stat. 187, 188. During the same year the extent of coverage was broadened to make explicit that obscene private letters were also barred. 25 Stat. 496.

In 1897, Congress adopted the predecessor to Section 1462 by prohibiting the interstate transportation by common carrier of obscene material. 29 Stat. 512. The section was revised and amended in 1905. 33 Stat. 705. In the Criminal Code of 1909, what are now Sections 1461, 1462, and 1463 were all revised, and a new class of non-mailable matter, "filthy", was added. 35 Stat. 1129, 1138. See *United States* v. *Limehouse,* 285 U. S. 424, 426. In 1920, motion picture film was explicitly added to the material which could not be sent in interstate commerce by common carrier. 41 Stat. 1060.

In 1930, after extensive debate of which some was quoted above (*supra*, pp. 69–71), Congress adopted, in the Tariff Act of that year, procedures designed to prevent the importation of obscene matter. 46 Stat. 688. Four years later, the broadcasting of obscene language was made a crime. 48 Stat. 1091, 1100. In 1948, the language was revised when the various sections were codified. 62 Stat. 768. In 1950, phonograph records were specifically added to the materials which could not be shipped by common carrier in interstate commerce (64 Stat. 194), and in 39 U. S. C. 259a the Post Office was given explicit administrative authority to exclude obscene matter from the mail. 64 Stat. 451. In 1955, the phraseology of Section 1461 was again broadened and a new section was adopted prohibiting any interstate transportation of obscene material for sale or distribution. 69 Stat. 183. And in 1956, Congress provided a statutory basis for the preliminary impounding of mail pending administrative proceedings under 64 Stat. 451. Public Law 821, 84th Cong. 2d Sess., 70 Stat. 700.

The legislation reviewed above reflects a strong congressional policy of 115 years standing. Throughout that period Congress has repeatedly broadened and extended the scope of the restriction on obscene material to make them applicable to new inventions, such as phonograph records and motion picture film, and to make them more effective. The competing social interests have been weighed by Congress, and its judgment is unequivocal.

(c) The courts, in weighing the competing interests, have universally held that restrictions on obscenity are valid

In July 1788, Chief Justice McKean of the Supreme Court of Pennsylvania considered the state constitutional guaranty of the freedom of the press in *Respublica* v. *Oswald*, 1 Dallas 319, 326:

> The true liberty of the press is amply secured by permitting every man to publish his opinion: but it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

This same judgment, when weighing the moral interest of society against the excesses of the press, has been reached by state courts, federal courts, and this Court throughout the history of the country.

The state court decisions are far too numerous for citation here. The early decisions, however, shed some light on the judicial balancing of interest in the period following the adoption of the Constitution. See *supra*, pp. 21–25. In *The People* v. *Ruggles*, 8 Johns. (N. Y.) 290, the Supreme Court of the State of New York upheld a conviction for blasphemy as a public offense punishable by the common law of the state. In the course of his opinion, Chief Judge Kent said (pp. 294–295):

> * * * Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; and shall we form an exception in these particulars to the rest of the civilized world?

In 1815, the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Sharpless*, 2 S. & R. 91, considered a case involving the commercial showing of a pornographic painting. The indictment charged that the defendants—

> intending the morals, as well of youth as of divers other citizens of this commonwealth, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, * * * did exhibit, and show for money, to persons * * * a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman * * * [at pp. 91–92].

Following are excerpts from the opinions of Chief Justice Tilghman and Justice Yeates:

> That actions of *public indecency*, were always indictable, as tending to corrupt the public morals, I can have no doubt; * * * Neither is there any doubt, that the publication of *an indecent book* is indictable * * *
>
> * * * * *
>
> * * * although every immoral act, such as lying, &c. is not indictable, yet where the offence charged, is destructive of morality in general; where it does or may affect every member of the community, it is punishable at common law. The destruction of morality renders the power

> of the government invalid, for government is no more than public order. It weakens the bands by which society is kept together. The corruption of the public mind in general, and debauching the manners of youth in particular by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences * * * [pp. 101–103].

The lower federal courts have on numerous occasions specifically considered the constitutional questions here raised, and have invariably held this statute and those comparable to it valid. *Schindler* v. *United States*, 221 F. 2d 743 (C. A. 9), certiorari denied, 350 U. S. 938 (Section 1461 constitutional; clear and present danger test does not apply); *United States* v. *Rebhahn*, 109 F. 2d 512 (C. A. 2), certiorari denied, 310 U. S. 629 (former 18 U. S. C. 334 held constitutional against charge of vagueness); *Coomer* v. *United States*, 213 Fed. 1 (C. A. 8) (predecessor to existing statute held constitutional); *Tyomies Publishing Co.* v. *United States*, 211 Fed. 385 (C. A. 6) (predecessor to existing section held not violative of free press, nor vague); *Knowles* v. *United States*, 170 Fed. 409 (C. A. 8) (Rev. Stat. 3893 does not violate religious freedom or freedom of press); *Rinker* v. *United States*, 151 Fed. 755 (C. A. 8) (Rev. Stat. 3893); *Besig* v. *United States*, 208 F. 2d 142 (C. A. 9) (customs proyision, 19 U. S. C. 1305 (a), upheld).

This Court has time and again referred to the validity of the restrictions on obscenity and frequently used that proposition as the firm starting point from which to consider other problems. The validity of the statute has repeatedly been upheld.

That this matter has been taken as obvious and not requiring extended discussion makes even more clear the value which our society instinctively places on each of the interests involved. We set out below, in chronological order, reference to opinions of the Court or of its individual members, touching on the validity of restrictions on obscenity:

In 1877, in *Ex parte Jackson*, 96 U. S. 727, 736, the Court upheld the validity of a statute making it a crime to send lottery circulars through the mail. The lottery statute was upheld as being an extension of the valid restriction on excluding obscene matter from the mails:

> In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared "that no obscene, lewd, or lascivious book * * * shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things * * * shall be deemed guilty of a misdemeanor * * *"
>
> All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries,—institutions which are sup-

> posed to have a demoralizing influence upon the people. * * *

In 1890, the Court considered the comparable provisions in Section 1 of the Act of July 12, 1876, 19 Stat. 90, and found that an obscene personal letter did not fall within the statute as then drafted. *United States* v. *Chase*, 135 U. S. 255, 261. The Court had no doubts as to the validity of the statute:

> We think that its purpose was to purge the mails of obscene and indecent matter as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination. *Ex parte Jackson*, 96 U. S. 727. This object seems to have been accomplished by forbidding the use of the mails to books, pamphlets, pictures, papers, writings and prints, and other publications of an indecent nature, and also to private letters and postal cards whereon the indecent matter is exposed to the inspection of others than the person to whom the letter is written.

In 1895, a conviction under the then obscenity statute, Rev. Stat. 3893, was affirmed by the Court where the issue related to the validity of the indictment. *Grimm* v. *United States*, 156 U. S. 604.

In 1896, the statute was before the Court three times. The first of these cases, *Rosen* v. *United States*, 161 U. S. 29, involved extended consideration of the extent to which the indictment had to allege which particular pictures and passages were obscene. It also turned on the question of what was meant by

"knowingly" using the mails for the transmission of an obscene publication. The Court said:

> The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious. [161 U. S. at 41–42.]

The second 1896 case was *Swearingen* v. *United States*, 161 U. S. 446, 451, which found that the lower court had erred in instructing the jury that a particular newspaper article was obscene. The article in question (161 U. S. at 447) was coarse and vulgar, but had few sexual references. The Court said:

> The words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel.

The third 1896 case was *Andrews* v. *United States*, 162 U. S. 420, which found that under the amended statute a person could be convicted for mailing an obscene private sealed letter.

In 1897, the Court, in *Robertson* v. *Baldwin*, 165 U. S. 275, 281, was not faced with the statute in question but said:

> Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles or other publications injurious to public morals or private reputation; * * *

In 1897, a conviction under Rev. Stat. 3893 was affirmed in *Price* v. *United States*, 165 U. S. 311, and in *Dunlop* v. *United States*, 165 U. S. 486, 501, where the Court considered the scope of the statute:

> It was in this connection that the court charged the jury that, if the publications were such as were calculated to deprave the morals, they were within the statute. There could have been no possible misapprehension on their part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure sexual relations. The words were used by the court in their ordinary signification, and were made more definite by the context, and by the character of the publications which had been put in evidence. The court left to the jury to say whether it was within the statute, * * *. We have no doubt that the finding of the jury was correct upon this point.

In 1904, came the Court's decision in *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508, in which it said:

> For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked.

In upholding the validity of the Mann Act in *Hoke* v. *United States*, 227 U. S. 308, 322, the Court relied, as a basic step in its reasoning, upon the validity of the restraint on obscene matter:

> * * * if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature * * *, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

In the same year, 1913, the Court upheld another conviction under the postal obscenity statute. *Bartell* v. *United States*, 227 U. S. 427.

In 1925, the validity of the postal obscenity statute was again used by the Court to support its conclusion as to another law. *Hygrade Provisions Co.* v. *Sherman*, 266 U. S. 497, 502:

> Many illustrations will readily occur to the mind, as for example statutes prohibiting the sale of intoxicating liquors and statutes prohibiting the transmission through the mail of obscene literature, neither of which have been found to be fatally indefinite because in some instances opinions differ in respect of what falls within their terms.

In considering the constitutional limits on the restraints which may be imposed on the freedom of the press in *Near* v. *Minnesota*, 283 U. S. 697, 716, the Court stated:

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing

> dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications.

In 1932, Mr. Justice Brandeis wrote the opinion of the Court in *United States* v. *Limehouse*, 285 U. S. 424, 425, reversing the decision below and holding that the statute must be construed more broadly than had been done by the lower court:

> They [the letters] were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term.

In 1938, in *Lovell* v. *City of Griffin*, 303 U. S. 444, 451, the Court had before it the issue of the constitutionality of a restriction on freedom of the press:

> The ordinance is not limited to "literature" that is obscene or offensive to public morals or that advocates unlawful conduct.

Again in 1942, in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572, the Court was considering the constitutional limits on free speech, and used the validity of restraints on obscenity in support of its decision as to epithets:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate

> breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310.

In 1946, Mr. Justice Douglas writing for the Court in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158, stated:

> The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted.

In *Winters* v. *New York*, 333 U. S. 507, the Court heard argument three times to aid it in its consideration of the limits on state regulation of the content of the press. In holding invalid the New York statute relating to magazines which massed stories dealing with crime, the Court pointed out that magazines are "subject to control if they are lewd, indecent, obscene, or profane," and referred to the permissible uncertainty in the standard "obscene, lewd, lascivious, filthy, indecent or disgusting" (333 U. S. at 510, 518).

In *Kovacs* v. *Cooper*, 336 U. S. 77, 80, the Court relied upon the fact that "obscene" was sufficiently definite in holding that "loud and raucous" was an adequate standard.

In 1952, the Court again relied upon the validity of restrictions on obscenity in reaching a decision on the statute in question in *Beauharnais* v. *Illinois*, 343 U. S. 250, 266. The Court stated:

> Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances.

In the same year, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 506, the Court left open the question of whether a state, through *prior censorship*, can prevent the showing of obscene moving pictures. The Court did not suggest, however, any doubts as to the validity of post-conduct punishment for the circulation of obscene material.

Thus this Court, over a seventy-five year period, has consistently and repeatedly considered the restriction here involved as valid and as a model, both as to definiteness and substance, of the sort of restriction to which the press may properly be subjected. The constitutionality of this provision has been relied on in determining the validity or invalidity of other forms of restraint. These decisions reflect not merely dicta but the considered judgment of the Court in some of the most controversial cases that have been before it. The expressions of the Court reflect an appreciation

of the value to society of public morality, and the worthlessness to society of obscene matter.[18]

As we have said above, the worth of social interests is judged by the regard with which they are held by enlightened society. There can be no doubt as to the views of the country or as to the prior views of this Court.

2. AS TO WHAT FALLS WITHIN THE "CONCEPT" OF OBSCENITY, THERE HAVE BEEN MARGINAL CHANGES AND DIFFERING VIEWS IN THE "BORDERLINE" AREA BUT OBSCENITY ITSELF REMAINS DISFAVORED.

As petitioner and appellants point out, the boundary line between what is called obscene and what is tolerated has shifted and continues to shift with the passage of time. This peripheral change has been modest, and "hard-core" pornography, the bulk of the published material caught by Section 1461, has never been tolerated. Even today, different countries have different ideas as to exposure, but none, so far as we know, considers as socially acceptable anything which degrades sexual intercourse.

[18] In 1947, Professor Chafee considering the constitutionality of 18 U. S. C. 1461, observed (*Government & Mass Communications*, vol. 1, p. 282):

> The effect of the First Amendment and freedom of the press upon the administrative mechanism of the Post Office is more important practically than their effect on the postal power of Congress. Questions of the unconstitutionality of legislation are somewhat remote from reality, because the existing postal statutes, if properly construed, seem to fall within the valid powers of Congress.

But in any case the significant point here is that changing mores as to the content of "obscenity" reflect no change as to the non-value of what is concededly obscene. That is still strongly disfavored in all parts of the world and all parts of this country. Different people may have different ideas of what is obscene even at any one time, but this does not indicate that they have any differences on the conclusion that what *is* obscene should not be circulated. It does not indicate any difference as to the relative value with which the competing social interests are held.

Petitioner argues that the more liberal attitude of today as to what is obscene justifies overturning the universal judgment of this country since it was established. We would suggest just the contrary. Within the United States, the edges of obscenity have been melting, so that discussion of many subjects, including sex, can now take place in more direct terms. These minor changes mean that, whatever idea content there may have been which was restricted fifty or seventy-five years ago, there is less today. When there was a greater risk of losing ideas of value by restricting obscenity, the nation decided that obscenity must nonetheless be restrained. Today, when less falls within the concept of obscenity, the result is *a fortiori*. Accordingly, there is less reason than ever before to allow material that is admittedly obscene to be circulated through the mails. Material that is obscene by today's standards is, as petitioner would have to agree, less likely to contain a worthwhile idea than what was considered obscene before.

II

The Fifth Amendment

SECTION 1461 IS NEITHER SO BROAD NOR SO VAGUE AS TO DEPRIVE PETITIONER OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT

Section 1461 is attacked as violative of the Fifth Amendment on two separate grounds. The first of these is that it is too broad. It is said that the legislation is not reasonably restricted to the evil with which it deals, and that, like the Michigan statute considered in *Butler* v. *Michigan*, 352 U. S. 380, 383, the effect is "to burn the house to roast the pig." The second respect in which it is urged that the statute fails to meet the standards of due process is in the definition of the crime. It is said that the statute is so vague that it does not give the jury an adequate basis for a decision based on law. The Government submits that, on the contrary, Section 1461 is neither too broad nor too vague.

A. To prohibit the mailing of publications which are calculated to corrupt and debauch the minds and morals of the average person in the community is no broader a restraint than required

In Point I, *supra*, at pp. 58–59, 71–74, we have discussed, with respect to the First Amendment, the charge that Section 1461 is too broad a restriction on free speech. We argued that, in the light of the relative balance of the competing interests involved, the statute is an appropriate restriction and therefore does not violate the First Amendment. Now, we consider

the companion issue of whether the statute is too broad under the Due Process clause of the Fifth Amendment—whether, aside from considerations of free speech, Section 1461 is too broad a prohibition for the specific evil with which Congress was dealing.

The Court's decision in this Term in *Butler* v. *Michigan*, 352 U. S. 380, held invalid a state statute which made it a crime to sell to an adult a book "manifestly tending to the corruption of the morals of youth". The Court found that the legislation was not reasonably restricted to the evil with which it was said to deal. In contrast to the Michigan statute, Section 1461 is as narrowly drawn a criminal statute as it could be to meet the evil at which it is directed. At the trial, the judge correctly charged the jury that to find petitioner guilty under Section 1461 they had to find that the material which he had mailed was "calculated to corrupt and debauch the mind and morals". The judge also instructed the jury that they must appraise the impact of the material on the "average person in the community". What the statute is aimed at is the prevention of the circulation of obscene material which is likely to corrupt the morals of people in general—not any particular class, not children, not the highly susceptible. The jury found the petitioner guilty. The court of appeals found that the evidence amply supported the verdict. Under the limited grant of certiorari, it is to be taken as given that the material to which the statute was construed to apply is likely to corrupt the morals of the average member of the community.

Assuming the validity of the statute under the First Amendment—namely, that Congress may properly forbid the distribution of printed material to persons whom it is likely to corrupt—is a statute unconstitutionally broad for due process purposes which prevents the mailing of material likely to corrupt the average person in the community? By hypothesis, the only narrowing of the statute that could conceivably be done would be to exempt from its scope those exceptional individuals who, because they were particularly hardened, or were blind, or had some other protection against the influence of the material, or because their morals were already fully corrupted, would not be subject to influence by that which would affect the average person.

But statutes do not have to be designed to except from their operation the exceptional case. It is obvious that, in the public interest, speed limits can be adopted even though some skilled drivers could safely go faster without creating any greater risk of injury than that arising when the average person drives at the speed limit. And non-intoxicants can be prohibited in order to control intoxicants. Cf. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Carolene Products Co.* v. *United States*, 323 U. S. 18; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–489. The constitutional requirement of due process is that there be a close relationship between the restriction and the evil, not that every exceptional circumstance be omitted from coverage by the act. To protect the

average person in the community Congress need not provide special mailing privileges for a few.[35]

Unlike the statute involved in *Butler* v. *Michigan*, 352 U. S. 380, Section 1461 restricts only a method of distribution in which it is practically impossible to distinguish whether the recipient of the material will be within the class of those susceptible to it. In the first place, it is impossible to tell who is susceptible to the material and who is not. Although we must concede that there are undoubtedly some persons whose morals would not be corrupted by exposure to a particular piece of pornography, there is no known way of separating them from the balance of the population. And although certain pornographic material might not affect one member of the community, more potent pornography, such as motion picture films of sexual orgies, might. It would be impossible to draft or administer a law which judged the material to be mailed by the likelihood that it would corrupt the particular recipient. And even if such a law could be written, it would raise far more serious questions than that here involved of whether restrictions based

[35] Whether or not Congress can prohibit the distribution of obscenity by other means to those not susceptible to it, Congress can certainly decide that it need not devote the mail service to carrying material which is harmful to the average person in the community. There can be no constitutional requirement that Congress must, for the benefit of the few, devote the postal service to distributing material which admittedly tends to corrupt the morals of the average person in the community. See *supra*, pp. 71–73.

on such subjective standards would provide due process of the law.

This is especially true because we are here dealing with a restriction on what goes through the mail. This fact provides additional justification for the reasonableness of the prohibition contained in Section 1461. There is no practicable method of determining even the age, let alone the susceptibility, of the recipient of material sent through the mails. It is not like the Michigan statute where the seller can look at the buyer and be expected to find out whether he is a minor. As the liquor laws demonstrate, such an across-the-counter transaction can be regulated in terms of the recipient. But the mailing list of advertising circulars cannot be similarly scrutinized. Not only is there no standard by which to judge who is not the average member of the community but there is no way of making sure that material sent through the mail would only go to such recipients. See also *supra*, pp. 61, 71–74; *infra*, pp. 106–107.

It is argued that the statute is too broad because it applies to all—that those who do not want to look at obscenity do not have to buy it. But a prime purpose of the restriction, as with the regulation of narcotics, is to restrain the distribution of material to those who want it. Further, as petitioner's case demonstrates, the commercial distribution of obscenity is not limited to those who want it. Of the exhibits for which petitioner was found guilty most were advertising circulars; only one was published matter for which a price had been paid.

B. *The statutory test, "obscene, lewd, lascivious, or filthy," is not so vague and indefinite as to deprive petitioner of his liberty without due process of law*

1. THE COMMON LAW BACKGROUND AND JUDICIAL CONSTRUCTION MAKE UNDENIABLY CLEAR THE CENTRAL MASS OF MATERIAL AT WHICH THE STATUTE IS DIRECTED

There can be no doubt as to what is the central mass of material at which Section 1461 is directed. A common law background of centuries and over a hundred years of statutory and judicial history in this country provide a firm guide. There is a solid core of material which, within the common law and under the statutes, is known to be obscene without doubt. This includes those matters which explicitly and purposefully deal with sex conduct in a degrading or perverted way, with no artistic aspect whatever—dirt for dirt's sake.

In particular, the judicial decisions construing the concept of obscenity not only make clear the central mass of material at which the statute is aimed but go far to lay down the standards by which the borderline areas are to be blocked out. Under these standards, the statute is limited to that material which, taken as a whole, constitutes a present threat to the morals of the average person in the community. *United States* v. *Levine*, 83 F. 2d 156, 157 (C. A. 2); *United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182 (S. D. N. Y.), affirmed, 72 F. 2d 705 (C. A. 2). Various subsidiary criteria now employed in considering the question of whether material is obscene prune out that which is calculated by its content and stereotyped repetition of such content to portray *ad*

nauseum the tasteless, offensive, and solely lustful. Thus, the author's purpose may be relevant. *United States* v. *Dennett*, 39 F. 2d 564, 659 (C. A. 2) ("The defendant's discussion of the phenomena of sex is written with sincerity of feeling and with an idealization of the marriage relation and sex emotions."); *United States* v. *One Book Entitled "Ulysses"*, 72 F. 2d 705, 706–707 (C. A. 2); *United States* v. *One Book, Entitled "Contraception"*, 51 F. 2d 525, 527 (S. D. N. Y.); *United States* v. *Hornick*, 131 F. Supp. 603 (E. D. Pa.), affirmed, 229 F. 2d 120 (C. A. 3); *Parmelee* v. *United States*, 113 F. 2d 729, 735 (C. A. D. C.). The view of book reviewers and the appraisals of competent critics is distinctly helpful. *United States* v. *One Book Called "Ulysses"*, 5 F. Supp 182 (S. D. N. Y.), affirmed, 72 F. 2d 705 (C. A. 2); *United States* v. *Levine*, 83 F. 2d 156, 158 (C. A. 2); *United States* v. *Rebhuhn*, 109 F. 2d 512, 515 (C. A. 2), certiorari denied, 310 U. S. 629. Consideration is given to the nature of the advertising, the promotional material, and the reputation of the publisher (*Burstein* v. *United States*, 178 F. 2d 665 (C. A. 9); *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938; *United States* v. *Rebhuhn*, 109 F. 2d 512 (C. A. 2), certiorari denied, 310 U. S. 629); as well as to the audience to whom the book is directed, and whom it is likely to reach (*United States* v. *Dennett*, 39 F. 2d 564, 568 (C. A. 2); *Parmelee* v. *United States*, 113 F. 2d 729, 731 (C. A. D. C.); *United States* v. *Rebhuhn*, 109 F. 2d 512, 514–515 (C. A. 2), certiorari denied, 310 U. S. 629).

With these aids, the ultimate question is the effect of the material "on a person with average sex instincts", *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, 183 (S. D. N. Y., affirmed, 72 F. 2d 705 (C. A. 2). Moreover, the "dominant effect" of a book as a whole is the criteria, not the effect of isolated passages torn from context. As the Second Circuit pointed out in the *Ulysses* case (72 F. 2d at 708):

> [W]e believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence: * * *.[36]

Under these tests, the central coverage of the statute is undeniably plain—"hard-core" commercial pornography and comparable non-commercial material—and the more peripheral areas of coverage are also indicated with sufficient definiteness. The de-

[36] See, in accord, *Roth* v. *Goldman*, 172 F. 2d 788 (C. A. 2), certiorari denied, 337 U. S. 938; *Parmelee* v. *United States*, 113 F. 2d 729 (C. A. D. C.); *United States* v. *Levine*, 83 F. 2d 156 (C. A. 2); *United States* v. *4200 Copies International Journal*, 134 F. Supp. 490 (E. D. Wash.); *United States* v. *One Unbound Volume, Etc.*, 128 F. Supp. 280 (D. Md.); *New America Library of World Literature* v. *Allen*, 114 F. Supp. 823 (N. D. Ohio); *United States* v. *Dennett*, 39 F. 2d 564 (C. A. 2); *Walker* v. *Popenoe*, 149 F. 2d 511 (C. A. D. C.); *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (S. D. N. Y.); *United States* v. *One Book, Entitled "Contraception"*, 51 F. 2d 525 (S. D. N. Y.); *One, Inc.* v. *Olesen*, No. 15,139, decided Feb. 27, 1957 (C. A. 9).

liberate purveyor of pornography knows definitely that his product is forbidden. On the other hand, there is little threat to literature or art. The classics are not in danger.[37]

2. IN THE NATURE OF THE PROBLEM, THERE CANNOT BE A FIXED AND PRECISE BOUNDARY TO OBSCENITY WHICH CAN BE SAFELY APPROACHED WITHOUT THE RISK OF GOING OVER

The subject matter of obscenity is words and pictures. As to each there are endless variations. There can never be a sharp and distinct boundary which the publisher of entertainment material can approach without the risk of being found to have crossed the line. The problem is most clearly seen in the field of photographs. Assume, for example, that a motion picture film is taken which starts with a couple fully clothed and, with pictures being taken at several frames per second, ends up with the couple naked and engaged in forbidden sexual conduct. Each individual frame is then enlarged, a regular photographic print made of it, and the prints lined up. If the prints are then considered as individual photographs, all will agree that the photograph at one end of the line may be freely circulated, and that the photograph at the other end is obscene. Going through these photographs from one end to the other, a point must be reached where they change from the acceptable to the obscene, and yet the difference between the two photographs will hardly be discernible to the naked eye.

[37] The customs statute specifically empowers the Secretary of the Treasury to admit "classics". 19 U. S. C. 1305 (a).

This is not as hypothetical a case as it may seem. The entertainment magazines, which stress the erotic interest, continue to pose girls with less and less on, and in more and more provocative postures. Each is competing with the others to get as close to the obscenity line as possible. See *supra*, pp 35–37. The publishers, who contend that they seek a definite line, ridicule any line that is proposed and point out that there is really little difference between what falls on one side of the line and on the other. No matter where the standard were drawn, there would be borderline cases; there would always be commercial producers trying to cater to the pornographic interest—trying to push their product closer to the legal line.

With written material the problem is simpler if only because fewer people try deliberately to write borderline material.[38] But here, again, there cannot be a razor-sharp and clear-cut line. Each work is judged as a whole. No mechanical test could replace such a judgment.

Even the outer boundary line is not now as vague as petitioner would suggest. The continental mass of commercial pornography is well marked on the maps, and is unmistakable. The shoal waters around the edge are also marked with well known buoys and an occasional wreck. No publisher approaches these waters without knowing what he is doing. Petitioner, with more than twenty-five years' experience in and

[38] Mr. Huntington Cairns, long-time advisor to the Treasury Department in the administration of its statute, comparable to Section 1461, has informed us that, in his view, there is no real difficulty in administration except as to pictures.

out of the courts (Pet. Br. 5–6), is typical of the publisher of borderline material. He knows well the interests to which he is catering, and the risks he is taking. He knows that many of the community will consider what he is circulating to be obscene. He weighs the chances on whether a jury of twelve will unanimously agree beyond a reasonable doubt that the material is so bad that it is likely to corrupt the morals of the average person in the community. Cf. *United States* v. *Wurzbach*, 280 U. S. 396, 399; *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340; and discussion *infra*, pp. 108–110.

It is argued that the statute is unconstitutionally vague because a jury in one part of the country might reach a different conclusion as to the same material from that which would be reached somewhere else. There is no merit in this contention. In certain instances, different results might be reached by different juries within the same city. This could be true of many a criminal case and many criminal statutes. But, by and large, the toleration of the country as to sex discussion and exposure is reflected in magazines of national circulation, in movies, radio and television, and in the newspapers. The very uniformity of social mores which has been condemned by many minimizes the problem. There is nothing to suggest that differences as to obscenity are as great as those between a city and a country jury on such well-recognized crimes as reckless driving or disorderly conduct.

The very differences which may be reached by a jury under the standard of obscenity protect the

freedom of press from restraint which would be imposed by a rigid statute which could not reflect more liberal ideas in the borderline area. The provision of a jury trial is primarily for the benefit of the defendant. Such variations as may result will usually work to his favor, since a verdict against him must be the unanimous view of all members.

3. THE STATUTORY STANDARD IS THE BEST THAT HAS BEEN DEVISED AND CERTAINLY LIES WITHIN THE RANGE OF LEGISLATIVE JUDGMENT

The many other statutes dealing with the problem demonstrate the language of Section 1461 is as definite as any that has been devised. A number of state statutes limit themselves to the word "obscene". *E. g.*, Fla. Stat. § 847.01 (1941); Tenn. Code Ann. § 11190 (1934); W. Va. Code § 6066 (1949); Wis. Stat. § 351.38 (1951). Others closely parallel the federal statutes. *E. g.*, "obscene, lewd, lascivious, filthy, indecent, disgusting or impure" (Utah Code Ann. § 76–39–1 (1953)); "obscene, lewd, lasciyious, filthy, indecent or disgusting" (N. Y. Penal Law § 1141 (1953) and Pa. Stat. Ann. Title 18, § 4524 (Purdon 1939)).

Some states have included within the statute language comparable to that with which the jury is instructed under the federal statutes. The New Hampshire statute defines an obscene book as one—

> whose main theme or a notable part of which tends to impair, or to corrupt, or to deprave the moral behavior of anyone viewing or reading it. [N. H. Laws 1953, c. 233.]

The Georgia statute (Ga. Code Ann. § 26–6301a (1953)) defines obscene literature as—

> any literature offensive, to * * * chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed.

None of these would seem to provide any greater degree of certainty than the standard of Section 1461.

Perhaps the best indication that the present statute, as construed, provides as much certainty as can be expected is the product of several years' study looking to the reform of the British laws on obscene material. See St. John Stevas, *Obscenity and the Law* (1956). As we have already noted (*supra*, p. 78), the text of the Obscene Publications Bill which was recently given a second reading (Appendix, *infra*, pp. 120–125) comes remarkably close to adopting the standard of Section 1461, as generally construed and as interpreted in this case. A person who knowingly distributes obscene matter is made guilty of an offense. Matter is to be deemed obscene, if—

> its dominant effect is such as to be reasonably likely to deprave and corrupt persons to or among whom it was intended, to be distributed, circulated, or offered for sale, * * *

So far as certainty in definition of the crime goes, that standard is the equivalent of Section 1461, as construed.[39]

[39] The provision that the effect of a book shall be judged by its impact on persons of the class among whom it was intended the book should be distributed was apparently designed to make sure that books intended for adults need not be held down to a child's standard. See Hansard, March 29, 1957, col. 1506, quoting from this Court's opinion in *Butler* v. *Michigan*, 352 U. S. 380. It would also have the effect of protect-

4. THE PRESENT STATUTORY CONCEPT OF OBSCENITY MEETS THE STANDARDS OF DEFINITENESS LAID DOWN BY THIS COURT

(a) To satisfy the constitutional requirement of clarity in a criminal statute, fair notice must be given as to the conduct which is deemed criminal. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U. S. 612, 617; *Jordan* v. *DeGeorge*, 341 U. S. 223, 230-232; *United States* v. *Petrillo*, 332 U. S. 1. But, as long as there is a core of conduct definitely understood as unlawful, it matters not "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls * * *". *United States* v. *Petrillo, supra*, at 7; *United States* v. *Harriss, supra*.[40]

The concept of definiteness demands no exact or precise standard. It need not be automatic. Thus, as applied to petitioner, 18 U. S. C. 1461 is at least as definite as other statutes sustained by this Court,[41]

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ing the legitimate publisher of, say, a scientific work, while allowing prosecution against a distributor who was circulating it generally.

[40] See, also, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 103-104; *Williams* v. *United States*, 341 U. S. 97, 101-102; *Jordan* v. *DeGeorge*, 341 U. S. 223, 231-232; *Dennis* v. *United States*, 341 U. S. 494, 516; *Beauharnais* v. *Illinois*, 343 U. S. 250, 263-264; *Robinson* v. *United States*, 324 U. S. 282, 286; *United States* v. *Wurzbach*, 280 U. S. 396, 399.

[41] E. g., *United States* v. *Wurzbach*, 280 U. S. 396 ("political purposes"); *United States* v. *Petrillo*, 332 U. S. 1 ("in excess of the number of employees needed by such license to perform actual services"); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 ("any offensive, derisive or annoying word"); *Gorin* v. *United States*, 312 U. S. 19 ("connected with or related to the

Each of the cited cases involved a general standard of considerable latitude, yet individuals were required to meet them. Cf. *American Communications Assn. v. Douds*, 339 U. S. 382, 412–413; *Dennis* v. *United States*, 341 U. S. 494, 515. We point out particularly that the Court has found that an Oregon statute providing that everyone shall drive "in a careful and prudent manner * * * and in no case at a rate of speed that will endanger the property of another" was sufficiently definite. "Following the authority in the *Nash* case, we sustained in *Miller* v. *Oregon*, *per curiam*, 273 U. S. 657, a conviction of manslaughter under a statute of Oregon." *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 464, 465. It could not be said that "ob-

national defense"); *Minnesota* v. *Probate Court*, 309 U. S. 270 ("psychopathic personality"); *Kay* v. *United States*, 303 U. S. 1 ("willfully overvalues any security"); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 ("fair and open competition"); *United States* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77 ("reasonable variations shall be permitted"); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8 ("unreasonable waste of natural gas"); *Omaechevarria* v. *Idaho*, 246 U. S. 343 ("range usually occupied by any cattle grower"); *Boyce Motor Lines* v. *United States*, 342 U. S. 337 ("practicable and feasible"); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 ("Kosher"); *Robinson* v. *United States*, 324 U. S. 282 ("liberated unharmed"); *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86 ("reasonably calculated", "tend"); *United States* v. *Alford*, 274 U. S. 264 (whether a fire is "near" the public domain); *United States* v. *Ragen*, 314 U. S. 513 ("a reasonable allowance for salaries or other compensation for personal services actually rendered"); *Lloyd* v. *Dollison*, 194 U. S. 445 ("wholesale" or "retail"); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (Hatch Act: "active part in political management or in political campaigns"); *Sproles* v. *Binford*, 286 U. S. 374 ("shortest practicable route"); *Miller* v. *Strahl*, 239 U. S. 426 ("to do all in one's power").

scenity", with its long statutory tradition and common law heritage, is less definite a standard than is reckless driving.

Of particular significance for obscenity is the accepted principle that a common law heritage and tradition is important in determining the clarity of statutory language. In *Jordan* v. *DeGeorge*, 341 U. S. 223, 229 "moral turpitude" was held to be sufficiently definite with the comment: "It is significant that the phrase has been part of the immigration laws for more than sixty years"; cf. *Nash* v. *United States*, 229 U. S. 373, where "restraint of trade" was construed in the light of its common law background.

As for the so-called borderline cases, so much discussed in the various briefs, the Court has also spoken clearly. Justice Holmes observed in *United States* v. *Wurzbach*, 280 U. S. 396, 399:

> But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

More recently, the Court said: "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340.

(b) But one need not look at other statutes to find the standard of definiteness approved by this Court. The concept of obscenity has repeatedly been before

the Court, and repeatedly been found sufficiently definite. In fact, the recognized validity of the obscenity standard has been used as a foundation for decisions on other statutes.[42]

In *Rosen* v. *United States*, 161 U. S. 29, 42, the Court discussed the predecessor to Section 1461:

> Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious. . .

Again in *Swearingen* v. *United States*, 161 U. S. 446, 450–451, the Court considered the same statute and pointed out that its definition derived from the common law:

> The offence aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. * * *

In *Winters* v. *New York*, 333 U. S. 507, both the majority and the dissent started from the proposition that the concept of obscene and indecent was sufficiently definite for a criminal statute. Mr. Justice Reed, for the majority, wrote:

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[42] See, also, the related discussion under Point I on the First Amendment, *supra*, at pp. 84–93.

> Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law, as violative of the public policy that requires from the offender retribution for acts that flaunt accepted standards of conduct. * * * The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. [333 U. S. at 515.]

The opinion then went on to refer to the difficulty of defining the line between what is unconstitutionally vague and the *permissible* standard of—

> describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting * * * [333 U. S. at 518.]

And in reaching its conclusion that the statute there involved was too vague, the Court pointed out:

> The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. [333 U. S. at 519.]

In *Kovacs* v. *Cooper*, 336 U. S. 77, 80, the Court again used the words "obscene, lewd, lascivious, filthy, indecent or disgusting" as—

> examples of permissible standards of statutes for criminal prosecution.

With this proposition as a basis for its reasoning, Mr. Justice Reed's opinion went on to find that the ordinance there involved complied with the requirements of definiteness and clarity.

It is submitted that the Court should not depart so widely from its prior views as to find at this time that the concept of obscenity, which has been used as a model for a permissible standard, is now so vague as to deprive petitioner of his liberty without due process of law.

III

The Ninth Amendment

IN EXERCISE OF ITS EXPRESSLY DELEGATED POWER OVER THE POST OFFICE, THE UNITED STATES MAY PROPERLY PUNISH THE MAILING OF OBSCENE MATERIAL WITHOUT INFRINGING UPON ANY RIGHT RESERVED TO THE PEOPLE UNDER THE NINTH AMENDMENT

It is argued that Section 1461 violates unenumerated rights reserved to the people under the Ninth Amendment. We believe that this issue is necessarily resolved by the decision as to the First Amendment.

The statute in question was adopted in exercise of the postal power delegated to the United States by Article I, section 8, clause 7 of the Constitution. There can be no doubt as to the general power of the United States to control what is sent through the mail and to punish persons for violation of its laws in this regard. *Ex parte Jackson*, 96 U. S. 727, and see *supra*, pp. 71–73. The exercise of this delegated power is unrestricted, unless it is cut across by some other explicit provision of the Constitution. If the Court should find that Section 1461 violates the First Amendment, no further inquiry need be made. But if, as we contend, the First Amendment

does not prevent the adoption of Section 1461 as an exercise of the postal power, then there is no provision of the Constitution which would limit the postal power.

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily, the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. [*United Public Workers* v. *Mitchell*, 330 U. S. 75, 95–96.]

To uphold petitioner's position on the Ninth Amendment, should he lose on the First, would require the Court to reach two rather remarkable conclusions: First, that there was reserved to the people by the Ninth Amendment some kind of a right to publish and distribute obscene material which was greater in scope than the freedom of the press protected by the First Amendment; and, secondly, that this unenumerated right reserved to the people under the Ninth Amendment could operate to take back some of the power expressly delegated to the United States in Article I, section 8. There is no support for either proposition.

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IV

The Tenth Amendment

UNLESS BARRED BY THE FIRST AMENDMENT, THE EXERCISE BY THE UNITED STATES OF ITS EXPRESSLY DELEGATED POSTAL POWER DOES NOT INFRINGE ON RIGHTS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

We believe that the question of the Tenth Amendment also turns on the decision as to the First Amendment. We accept, of course, the proposition that the United States was given no expressly delegated power to control the press directly and also that the First Amendment cuts across the delegated powers in Article I, section 8. The First Amendment sets a limit on the extent to which the delegated powers may be used to restrain excesses of speech or press. Congress may not use its postal or commerce powers to abridge the freedom of the press in violation of the First Amendment.

But if this Court has been correct in its prior holdings, and if we are correct in our argument under Point I, that punishment for sending obscene material through the mail does not violate the First Amendment, then the law providing for such punishment is clearly within the delegated postal power. Falling within the postal power, it is not one of the rights reserved to the states.

There can be no doubt that, unless barred by an express constitutional restriction, the delegated powers may be used to control matters primarily subject to state control. Although the United States may not

be able to regulate lotteries as such, it may prevent the sending of circulars about lotteries through the mail, *Ex parte Jackson*, 96 U. S. 727, and bar the interstate transportation of lottery tickets. *Champion* v. *Ames*, 188 U. S. 321. Although the police power governing the adulteration of food and the conduct of women was reserved to the states, Congress may use its delegated power over interstate commerce to seize adulterated food shipped in interstate commerce, *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, or to punish for the interstate transportation of women for immoral purposes. *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470, 491:

> * * * the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Similarly, Congress can prohibit the use of the mails to defraud, even though the states have the primary responsibility for protecting against fraud and deceit.

The general principle was summed up by Mr. Justice Brandeis in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or

that it may tend to accomplish a similar purpose.

The numerous cases discussed above (*supra*, pp. 84–92) in which the Court has upheld the validity of the postal restriction on obscenity are not only holdings that such power is consistent with the First Amendment but also that such power is not barred by the Tenth Amendment. There is thus no question of the states' having a reserved right to regulate obscene material in the United States mails—unless it is now found that the First Amendment prevents the Federal Government from doing so. If Section 1461 is valid under the First Amendment, it does not conflict with the Tenth. If it is invalid under the First, the Court need not bother to consider the Tenth.

But beyond this analysis, there is no merit in the suggestion that each state should be free to decide what constitutes obscenity for mailing purposes and whether such material should be allowed to circulate in that state via the United States mails. Any such system would be impossible to administer. The Post Office could not have forty-eight standards of what was mailable. It would have to carry freely everything sent, even though to send it was a crime in the state in which it was mailed and to receive it was a crime in the state where it was received. Under this view, the United States would be required by the Constitution to aid in the circulation of obscene material which was illegal in every state. The United States would be required to receive from abroad advertisements for pornography as well as pornography

itself (and presumably from the District of Columbia), and transport it in the mail to anyone in the country. We can see no merit in such a construction of the Constitution, wholly out of keeping with the constitutional history of this country which increasingly has involved the use of the delegated powers in support of anything which the states can do under the Fourteenth Amendment.

Petitioner argues that to hold Section 1461 invalid would not remove all restraints on obscenity—that the states would still be free to impose restraint. To support his view that the Constitution permits state restraint he quotes from Jefferson and from Congressional debate in 1836 (Pet. Br. 10, 12, 18–21). These general expressions of view all took place prior to the adoption of the Fourteenth Amendment.

This Court has made clear that free speech and freedom of the press are part of the liberty that is protected by the Fourteenth Amendment. Although the standards of permissible regulation may not be precisely the same, it is the same liberty which is protected. It would certainly be an odd result, inconsistent with prior views, to hold that the United States was constitutionally required to carry through the mail material of which the states could prevent the publication. Punishment for sending obscene material through the mail does not infringe on rights reserved to the states.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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Assistant to the Solicitor General.
JEROME M. FEIT,
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APRIL 1957.

APPENDIX

Proposed British Legislation on Obscenity

Printed below is the pending Obscene Publications Bill which was read a second time in the House of Commons on March 29, 1957. The debate appears in Hansard, Volume 567, cols. 1493–1583.

Obscene Publications Bill

EXPLANATORY MEMORANDUM

1. The Bill makes changes in both the substance and the language of the law. The common law misdemeanour of obscene libel disappears and is replaced by a new statutory offence.

2. The question of guilty knowledge is declared to be relevant, and the test of obscenity is made dependent upon:

(*a*) the dominant effect of the publication;

(*b*) the literary or other merit of the publication;

(*c*) the class of persons among whom it is intended to circulate.

3. The word "obscene" is extended to cover publications that unduly exploit horror, cruelty and violence.

4. Whereas the common law sets no limit to the punishment for obscene publications, the Bill defines maximum penalties.

5. Further, the Bill amends the law relating to "destruction orders" by magistrates in the following ways:—

(*a*) by introducing the same test of obscenity as that prescribed for criminal offences;

(*b*) by giving the author, publisher, printer and distributor the right to give and call evidence.

6. The destruction of obscene publications by the customs authorities is made dependent on the issue of a destruction order by a magistrate.

7. Provision is made for uniformity in the operation of the law by making all proceedings in England and Wales subject to the consent of the Attorney-General.

ARRANGEMENT OF CLAUSES

Clause
1. Offences under the Act.
2. Definition of obscenity.
3. Penalties.
4. Prohibition of importation of obscene matter.
5. Enactments nullified.
6. Obscene libels.
7. Savings.
8. Initiation of proceedings.
9. Repeals.
10. Short title and extent.

SCHEDULE—Enactments Repealed.

A BILL TO AMEND AND CONSOLIDATE THE LAW RELATING TO OBSCENE PUBLICATIONS

A. D. 1957

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Offences under the Act.

1. Any person who shall wilfully and knowingly distribute, sell, or offer for sale,

or write, draw, print or manufacture for any of the aforesaid purposes, any matter which to his knowledge is obscene within the meaning of this Act, shall be guilty of an offence:

Provided that in any proceedings under this Act, or under the Obscene Publications Act, 1857, a person who wrote, drew or composed, or printed or published the matter in respect of which the proceedings are brought shall be entitled, if he desires, to appear and to be represented in the proceedings and to be heard by the court upon the question whether the matter is obscene.

Definition of obscenity.

2. Any such matter shall be deemed to be obscene for the purposes of this Act, the Obscene Publications Act, 1857, or any other enactment, if

(*a*) its dominant effect is such as to be reasonably likely to deprave and corrupt persons to or among whom it was intended, to be distributed, circulated, or offered for sale, or

(*b*) whether or not related to any sexual context, it unduly exploits horror, cruelty, or violence, whether pictorially or otherwise:

Provided that in deciding whether such matter is or is not obscene the court may receive expert evidence as to the literary or artistic merit, or the medical, legal, political, religious, or scientific character or importance of the said matter.

Penalties.

3. Any person who commits any offence against this Act shall be liable on summary conviction to a fine not exceeding one hun-

dred pounds or to imprisonment for a term not exceeding four months, or on conviction on indictment to a fine not exceeding five hundred pounds or to imprisonment for a term not exceeding twelve months.

Prohibition of importation of obscene matter.

4.—(1) The Commissioners of Customs and Excise are hereby empowered to seize and detain any obscene matter which is in course of being imported into or exported from England and Wales.

(2) When any such matter is so seized, the Commissioners of Customs and Excise shall take proceedings under the Obscene Publications Act, 1857, as adapted by sections one and two of this Act, for the order of a court of summary jurisdiction that the matter seized be either destroyed, delivered to the consignee or returned to the person from whom it was seized:

Provided that where such proceedings have not been instituted within a reasonable time, the matter seized shall be returned either to the consignee or to the person from whom it was seized.

Enactments nullified.

5. The provisions of any Act, whether public, general, local, or private, which are in terms identical or substantially identical with any of the provisions of this Act, are hereby declared to be of no effect.

Obscene libels.

6. It is hereby declared that obscene libel shall not be punishable at common law.

Savings.

7. Nothing in this Act shall affect the operation of the Judicial Proceedings (Regulation of Reports) Act, 1926, or the Law of Libel Amendment Act, 1888.

Initiation of proceedings.

8. No proceedings under this Act or under the Obscene Publications Act, 1857, except for the purpose of subsection (1) of section four of this Act, shall be initiated unless by, or with the consent of, the Attorney-General.

Repeals.

9. The enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title and extent.

10.—(1) This Act may be cited as the Obscene Publications Act, 1957.

(2) This Act shall not apply to Scotland or to Northern Ireland.

SCHEDULE

ENACTMENTS REPEALED

Session and Chapter	Short Title	Extent of Repeal
5 Geo. 4 c. 83.	Vagrancy Act, 1824.	In section four, the words "every person wilfully exposing to view in any street, road or highway, or public place, or in the window or other part of any shop or other building situate in any street, road, highway, or public place, any obscene print, picture or other indecent exhibition".
10 & 11 Vict. c. 89.	Town Police Clauses Act, 1847.	In section twenty-eight, the words "or publicly offers for sale or distribution or exhibits to public view any profane, indecent, or obscene book, paper, print, drawing, painting or representation".
39 & 40 Vict. c. 36.	Customs Consolidation Act, 1876.	In section forty-two the words "Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles".
15 & 16 Geo. 6. and 1 Eliz. 2 c. 55.	Magistrates' Courts Act, 1952.	Paragraph 16 of the First Schedule.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE*

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(Submitted upon consent)

IN THE

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BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE*

Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. is a membership corporation composed of most of the leading publishers of books of general circulation and university presses. It is estimated that the 146 members of the Council publish and distribute not less than 90% of all general books. Among these publishers are Doubleday & Company, The Macmillan Company, McGraw-Hill Book Company, Inc., Charles Scribner's Sons, Harper & Brothers, Grosset & Dunlap, Inc., Little Brown and Co., Random House, Inc., The Viking Press, Inc., and Alfred A. Knopf, Inc.; among the university presses are those of Columbia, Harvard, Yale, Princeton, North Carolina, Louisiana, Minnesota, Oklahoma, California and Stanford.

As publishers, the members of the American Book Publishers Council, Inc. are keenly interested in safeguarding freedom of the press as guaranteed by the First Amendment. The Council files this brief, because its members believe that Section 1461 of Title 18, U. S. C., as applied in the instant case, violates such freedom. This position is taken without reference to the publications upon which the conviction herein was predicated.

The Statute Here Under Consideration

The statute under which the petitioner was convicted, at the time of the indictment, insofar as here pertinent, read as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—* * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *
>
> "Every letter, packet, or package or other mail matter containing any filthy, vile, or indecent thing, device, or substance; * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination" (18 U. S. C., Section 1461, 62 Stat. 768).

Contention of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. submits that this statute, as herein applied, involves an unconstitutional abridgment of the rights guaranteed by the First Amendment because of the failure to satisfy the requirements of the "clear and present danger" rule as laid down by this Court.

Argument

The three freedoms set forth in the First Amendment—freedom of speech, of the press, and of religion—occupy "the preferred place given in our scheme. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions" (*Thomas* v. *Collins*, 323 U. S. 516, 530 [1945]. See also *Saia* v. *New York*, 334 U. S. 558, 561 [1947]). These basic freedoms are not subject to regulation in the same manner as matters relating to business, labor and health may be regulated by Congress.

This protection extends to all types of writings, irrespective of their literary worth. In *Winters* v. *New York*, 333 U. S. 507, 510 (1948) this Court said "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. Cf. *Hannegan* v. *Esquire*, 327 U. S. 146, 153, 158." The Court thereby rejected the contention "that the constitutional protection for a free press applies only to the exposition of ideas".

Furthermore, it has never been actually decided by this Court that different constitutional standards are to be

applied to publications relating to sex than have been uniformly applied to publications relating to other subjects. The assumption that the First Amendment does not protect against the publication of "obscene" writings, proves upon analysis to be without foundation. Those who have made this assumption apparently consider that the presentation of sexual problems is in some sort of category by itself, and that therefore any depiction of sex conduct is removed from the constitutional protection of freedom of the press. Such doctrine obviously would deny protection to discussion of a significant part of life. Research has revealed nothing in the history of the Bill of Rights which would support that exclusion. Madison, a leader in the framing of the Bill of Rights, in describing the sentiment leading to the guaranty of freedom of the press in State constitutions, said:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." (Report on the Virginia Resolutions, *Letters and Other Writings of James Madison*, Vol. 4, p. 544.)

It seems clear, therefore, in the light of the *Winters* case, that the right to publish printed matter, even though of little or no literary value, and whether or not concerned with matters of sex, must be measured by the same test which has governed the decisions involving attempts to restrict freedom of speech and of the press since *Gitlow* v. *New York*, 268 U. S. 652 (1925).

Thus, it is submitted that Section 1461, like any other statute in derogation of the First Amendment, is subject to

the same test as to validity. That test, although it has been stated in varying terms, is the classic "clear and present danger" test, as set forth in *Schenck* v. *United States*, 249 U. S. 47 (1919). There this Court held that the broad protection guaranteed by the First Amendment excepts only such utterances or writings as "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (p. 52). In *Dennis* v. *United States*, 341 U. S. 494, 510 (1951), this Court modified this test by holding that it is sufficient that there exist the *probability* of such a danger. Thus, this Court stated:

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Unlike the situation in most of the First Amendment cases which have come before this Court in recent years, we do not have in this case any guidance as to the "substantive evil" which the statute was designed to prevent. Thus, neither the statute itself, nor any authoritative interpretation thereof, informs us whether it is designed to prevent in the normal adult reader (1) the arousing of lewd thoughts and desires or (2) incitement to crimes or other anti-social conduct.

If the substantive evil which Congress was aiming to eliminate was the arousing of lewd thoughts and desires, such legislation would appear to be clearly unconstitutional as *thought control*.

Over seventy-five years ago this Court said in *Reynolds* v. *U. S.*, 98 U. S. 145, 164 (1878):

> "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

See also:

West Virginia State Board of Education v. *Barnette*, 319 U. S. 629, 642-643 (1943);
American Communications Ass'n v. *Douds*, 339 U. S. 382, 396, 406-412 (1950);
Dennis v. *United States*, 341 U. S. 494, 502 (1951).

That the substantive evil is indeed the arousing of lewd thoughts and desires seems clear from the very definition of "obscenity" as charged by the Trial Court in the instant case:

> "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts." (T. R. 25)

This charge correctly incorporated the approved test of "obscenity" as appears from the concurring opinion of Judge Frank who stated that "the correct test is the effect on the sexual thoughts and desires * * * of average, normal, adult persons" (T. R. 48). It was precisely because the arousing of lewd thoughts and desires was the "substantive evil" that prompted Judge Frank to state "that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires—not overt dangerous or anti-social conduct, either actual or probable" (T. R. 50).

However, if the substantive evil which Congress sought to eliminate was the perpetration of crime or other anti-social conduct resulting from the dissemination of obscene publications, then there must be proof of the existence of such a substantive evil.

The fact is that there was no proof in the Trial Court as to what the substantive evil was or that the danger thereof was so clear and immediate or probable as to justify suppression of publication.

Nor is this failure of proof remedied by the holding of this Court in *Dennis* v. *United States*, *supra*, that "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts" (p. 513.) For, obviously, before a court may rule as a matter of law that there is "a clear and present danger of a substantive evil that Congress has a right to prevent", there must be a determination as to what the substantive evil is, and, additionally, there must be some basis for a finding that there is causal relationship between the act complained of and such substantive evil.

The simple fact remains that it has been *assumed*, but never established, that there is a causal connection between the reading of obscene literature and the perpetration of crime or other anti-social conduct. "The advocates of obscenity censorship simply assume, with no attempt at proof, that reading about sex is a primary cause of sexual deviation". (Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minnesota Law Review 295, 383 [1954] and authorities there cited.)

The dictum of this Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572 (1942) to the effect that certain "well defined and narrowly limited classes of speech" have no constitutional protection and that these include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace", must be read in the context of the *Chaplinsky* case, which involved the utterance of insulting epithets upon the public streets.

It is submitted that such dictum has no application to a publication directed, not to an individual, but generally to the public at large. For in the instances above enumerated in the *Chaplinsky* case, the substantive evil, as to which there is clear and present danger, may well be a breach of the peace. It is obvious that if some one mails a letter to a particular person, containing obscene or indecent proposals, as was the case in *United States* v. *Limehouse*, 285 U. S. 424 (1932), or utters such words in the presence of others, the recipients or auditors may well be moved to inflict corporal punishment upon the perpetrator —bringing about a breach of the peace.

In conclusion, it is submitted that since there has never been established any causal connection between the dissemination of obscene publications and any substantive evil, the restriction on freedom of the press imposed by Section 1461 cannot be justified.

Respectfully submitted,

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SAMUEL ROTH,

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Respondent.

BRIEF OF MORRIS L. ERNST
Amicus Curiae

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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF MORRIS L. ERNST

Amicus Curiae

Interest of the *Amicus*

For more than 40 years at the bar I have had the great good fortune to be involved in First Amendment causes. In the writing of books and articles, more than I now like to recall, I have had a deep and satisfying concern with the problems of censorship over the mind of man.

I surmise that such enjoyed dedication to this important sphere of the law prompted the Solicitor General to give permission to the filing of this brief—in opposition, I assume, to what may be his own position. I express here my gratitude together with a hope that this brief may be of some slight aid to the Court. I speak only my own mind and not that of any other person or group.

Summary of the Argument

The First Amendment must be construed in the light of its historical development if we are constitutionally to resolve the problems which have arisen in connection with the attempted regulation of freedom of speech and press. In that light, we must now recognize that there are three different areas of ideas which claim Constitutional protection. Of these, the Federal Government has the power to regulate the two groups which embrace seditious words and "merchandise words," respectively. But the third group, which is here termed that of Ideas *qua* Ideas, consists of those ideas which have as their purpose purely their impact on the mind of man; and it is this last group which carves out an area in the realm of ideas which the First Amendment places beyond the power of the National Government.

This construction of the First Amendment is in accord with the fundamental concepts underlying the Ninth and Tenth Amendments by which there was reserved to the States the regulation of the morals of the community. The absence of centrally decreed uniformity in this area of folkways and morals is vital to the preservation of Federalism in this Republic.

The history of the Constitutional Convention, of the Bill of Rights and of proposals debated in the earlier Congresses makes it abundantly clear that it was not the intent to grant to the central government by way of the postal, commerce or importation powers legislative authority in those areas reserved implicitly in the original Constitution and explicitly by the First, Ninth and Tenth Amendments to the States. The statute here involved bears witness to the fulfillment of the prophetic fear that the Congress will

seize upon these powers to base claims to those reserved powers of the states.

The only qualification which may be imposed on the power of the states over speech and press in the areas of Ideas *qua* Ideas is that which is ordained by the 14th Amendment.

"Obscenity" being a word incapable of precise definition and dependent in any particular situation upon an infinity of variables cannot serve as a Constitutional basis for predicating criminal liability. The Fifth Amendment forbids this.

The evil aimed at is unclear; proof of the causal relationship between the material protected by the First Amendment and the supposed evil does not exist at this moment of our history.

POINT I

Although originally the First Amendment forbade the abridgement of all speech and press, we must now recognize that the ideas underlying the First Amendment fall into three distinct and separate categories.

Freedom for all material that goes to the mind of man is a concept historically impressive. Yet few would deny that our present Constitutional attitudes concerning this concept are less than precise. Since the days of the Founding Fathers, totally new pressures on the Republic have arisen and have compounded the imprecision of the concept.

It is my thought that the resolution of the present Constitutional confusions and dilemmas may be assisted by examination of the distinctions between the three streams of ideas with which the freedoms of speech and

press are presently concerned. I suggest that Constitutional history indicates that a clarification is now necessary in terms of the distinctions between that speech and press which affect, in one sector, the preservation of governmental sovereignty; that in a second sector, trade and commerce in Things; and that in a third sector, ideas *qua* ideas.

The goodness or badness of ideas in this last sector can be tested only over the ages, and on such a gamble do we predicate our way of life.

Man has ever had a fear of ideas. The first clearly pronounced target was blasphemy during the early ages. Then, as the power shifted from the church to the state and from clergy to kings, the threat of the fearful became fixated upon sedition. Thereafter followed the Industrial Revolution and the Distributive Revolution, the latter utilizing words and ideas as auxiliaries to merchandise; and the Court found it constitutional to abridge the speech and press employed to solicit and to sell. The last target of the censorious, first attacked in England around 1860 and in our land around 1870, is obscenity in printed materials, accompanied by presumed dangers of anti-social sexual behavior.

The first area, in which censorship was born, that of blasphemy, is no longer significant, for the Government does not undertake to punish blasphemy, nor does it undertake to define what blasphemy might be. Neither are the states permitted to legislate test acts founded upon the criteria of blasphemy. Cf. *Burstyn* v. *Wilson*, 343 U. S. 495 (1952).

But in three other areas into which I am persuaded speech and the flow of the press have by force of history become divided, Government has undertaken to regulate the words which may be promulgated and received by the

public. I suggest that in two of these areas regulation may be constitutionally proper while in the third area it is absolutely prohibited. Without violating the First Amendment, the Government may justifiably permit abridgement of freedom of speech and press in the area of sedition and in the area of "merchandise words," but the Government may not without violating that Amendment abridge freedom of speech or press in the third area, of which "obscenity" (along with scandal, sadism, etc.) is a part. The distinctions between these various areas are distinctions of substance. It is this last area which is involved in the instant case. Here the First Amendment must be literally rendered: no abridgement is tolerable.

(a) In the area of seditious words, the Government has the power to abridge freedom of speech and press.

This first sector is comprised of ideas of sedition, those ideas that have impact on the very sovereignty of the Republic. It would be absurd to plead that our sovereign Republic is legislatively impotent to protect itself from attack. The constitutional concern in this area has shifted from that of the *existence of a power* to that of the *selection of the criteria* to be applied in the balancing, on a risk-for-risk basis, of individual freedom against national continuance. See, e.g., *Dennis* v. *United States*, 341 U. S. 494 (1951).

It is irrelevant in this brief to indicate more than that the outer limits of freedom of speech and press might better be tested by a standard more objective than the Holmes slogan of clear and present danger (always clear to the frightened, never present to the brave!), enunciated in *Schenck* v. *United States*, 249 U. S. 47 (1919). Rather does the Brandeis formula—is there time to make answer,

or in the alternative, time to call the police—insist on greater objectivity by judge or jury before the killing of ideas:

> "* * * [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Brandeis, J., concurring in *Whitney* v. *California*, 274 U. S. 357, 377 (1927). See also Ernst and Katz, "Speech: Public and Private," 53 Col. L.R. 620 (1953).

(b) In the area of "merchandise words," the Government has the power to abridge freedom of speech and press.

The second sector of idea content which can be segregated from the instant case is that which concerns "merchandise words." It is an area not yet born in 1791, when our largest library was 4,000 books and we had only 100 newspapers. "Merchandise words" are words which promulgate ideas, yes, but ideas only in order to sell lottery tickets, stocks, bonds, drugs, liquor or any other Thing or Things. This includes shoes, ships, sealing wax and cabbages—but not Kings. Merchandise words are merely tools of things and do not have as their sole or prime target the mere impact on the mind of man. These are, rather, the words of commerce, the exchange between buyer and seller, the *quid pro quo*, the bargain and sale, the offer and acceptance:

There is no question but that the Federal government may pass legislation governing the use of merchandise

words in commercial or trade activities involving commerce or the mails. See, e.g., *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U.S. 419 (1937).

(c) But in the area of ideas *qua* ideas, the Government may not abridge freedom of speech and press.

It is in the third sector of idea content that the First Amendment proscribes the abridgement of freedom of speech and press. This third sector is the sacred area of 'ideas for ideas' sake.' This is the area of words which have as their real objective their ultimate resting place in the restless mind of man—that instrument made sacred in constitutional terms by the First Amendment.

A sentiment may seem constitutionally relevant that our daily press is breeding a race of tasteless people to whom tawdry personal relations and sadism are made to seem normal. But the question in constitutional terms can never be one of decency or taste. Forces other than law exist in our culture to develop that degree of inner security which will minimize the need for vicarious tawdry living. I suggest that much of the distortion in legal constitutional thinking arises from the failure of the judicial stream to isolate this sector from the other two.

In this area we have not the Thing but the idea; not the package but the medium; not the paper, the ink, the binding, the film, but the thought. It is the thought, the idea—educational or entertaining—which, good or bad as judged by the whims of a passing generation, is the *res* of this area. We are not here concerned with the collateral paper or binding which is merely employed for the transmission of the constitutionally protected ideas of man.

Over the decades this Court will no doubt have to draw lines a little to the right or a little to the left to demark the

words which the Government may regulate from those words which are not seditious words, which are not merchandise words, but which are words which represent ideas *qua* ideas. Indeed since *Near v. Minnesota*, 283 U.S. 697 (1931), this Court, over a span of 26 years, has employed dicta in various cases in an effort to pinprick the frontiers of this sector. I submit that the Court might take the instant opportunity to further define these all-important frontiers.

In light of the above, I now proceed to the sacred area which the Constitution removes from National Governmental power.

POINT II

Section 1461 of Title 18 of the United States Code, 62 Stat. 768, 69 Stat. 183, invades the reserved powers of the States in violation of the First, Ninth and Tenth Amendments.

The statute here under attack, Sec. 1461 of Title 18 of the United States Code, must be read in the context of two parallel statutes, Sec. 1462 of the same Title and Sec. 1305 of Title 19. Section 1461 of Title 18 of the United States Code, in pertinent part, provides:

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character; * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding

in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 1462 of Title 18 of the United States Code, in pertinent part, provides:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly deposits with any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; * * *

"Whoever knowingly takes from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 1305 of Title 19, in pertinent part provides:

"All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast instrument, or other article, which is obscene or immoral * * *

"(P)rovided further, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes."

In the main, Section 1462 of Title 18 prohibits the interstate transportation by common carrier of the same matter

of which Sec. 1461 of that Title prohibits the mailing and of which Sec. 1305 of Title 19 prohibits the importation. The effect of these sections is pervasive regulation by the Federal government of the permissible content of printed communication (written or pictorial) in the area under review. A network of Federal law thus abridges the freedom of the people to communicate, not only across state or national boundaries but also—since Section 1461 applies to both intra- and inter-state mailing—within the boundaries of a single state.

Has the Federal Government—a government of delegated and enumerated powers only—the constitutional authority thus to restrict the rights of speech and press? It is submitted that there is no such Federal authority.

(a) The Constitution delegates no power to the Federal Government to regulate community morals.

Obscenity legislation implements governmental control over the media of communication for the purpose of regulating community morals. Regulation of community morals is, under our federal system, within the jurisdiction of the states. The Federal Government has no authority over local morals—there is no Federal power to control marriage, divorce, adultery, bigamy, or any other of the subjects related to the moral good order of the community. These matters are the concern solely of local government. The Ninth and Tenth Amendments to the Constitution affirm State power over these matters, as to which no power was delegated to Congress.

(b) The Constitution delegates no power to the Federal Government to regulate speech or press.

The original Constitution, proposed to the States by the Constitutional Convention, contained no provisions relating to the rights of speech and press. No authority to regulate speech or press was delegated, and there were no provisions curtailing Congressional authority with respect to speech or press. On the floor of the Convention, a proposal to forbid Congressional interference with freedom of the press was put forward. It was defeated on the ground that it was unnecessary in that "the power of Congress does not extend to the press" (Elliott's Debates, 545 (1854).) This belief was universally accepted by Federalists and anti-Federalists alike in the debates on ratification which ensued. And such universal acceptance must be regarded as a significant accord of the conflicting groups, for there were so few questions upon which they did agree. See Hart, "Power of Government Over Speech and Press", 29 Yale L. J. 410 (1920).

There was no doubt in the minds of the Founders—those who favored the original Constitution as well as those who insisted on amending it—that the limited powers conveyed to the Federal government did not permit Congressional regulation of speech or press. But there were many who foresaw the danger that such authority might be arrogated through a doctrine of implied powers. For this reason they urged immediate adoption of a Bill of Rights.

Thus, Hamilton, justifying the absence of a Bill of Rights said:

> "They [a Bill of Rights] would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more

> than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"
>
> (The Federalist (J. C. Hamilton ed. 1864) 631)

To which Jefferson replied:

> "Very well, I agree with you that the power is not legitimately here, and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as a common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it beyond peradventure that it is not one of the powers granted to the National Government."
>
> (As quoted in Hart, *op. cit.*, p. 412.)

(c) Congress cannot invoke the commerce power, the postal power or the power to regulate imports as a basis for regulating such speech or press.

As stated above, the statute here under attack must be read in the constitutional context of the statutes which forbid the importation of the same matter or its interstate transportation by common carrier. The purport of these three statutes is thus to regulate the rights of speech and press on the basis of the commerce powers and the postal power. Congress has attempted to obviate the absence of express power to regulate, on the one hand, morals, and, on the other, the media of communication, by

construing the specific delegations of commerce and postal powers as permitting such regulation by inference. The scope of the statutes is sweeping and their impact on the rights of free exchange of ideas is profound. Can Congress, thus, by indirection, exercise a power not delegated? The answer appears in the negative.

(1) *The First Amendment was intended to prohibit regulation of speech and press by the Federal Government under any enumerated power.*

It was precisely for the purpose of preventing Federal regulation of the kind here involved that the First Amendment was passed. Exactly this the proponents of the Bill of Rights feared—that the Federal Government might find indirect ways of regulating speech and press although no express power was delegated. Jefferson's observation, that "there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press," Hart, *op. cit.*, 412,—was the foundation of the effort for express limitation of Congressional power. In order to achieve such a precise restriction, Madison presented the Bill of Rights to the First Congress, on June 8, 1789 saying:

> "* * * if all power is subject to abuse, then it is possible that the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done * * *"
>
> (1 Annals of Congress 432)

Answering the argument that a Bill of Rights was unnecessary because the Federal Government was one of enumerated powers Madison went on to say:

> "It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent * * *."

referring as had Jefferson explicitly to the necessary and proper clause (*Id.* at 438).

To guard against the possibility of regulation of speech and press by resort to construction of the enumerated powers Madison stated that:

> "* * * the great object in view is to limit and qualify the powers of Government, by excepting out of the grants of power those cases in which the Government ought not to act * * *" (*Id.* at 437)

And after the House had adopted the restraints on Congressional power prohibiting the Federal Government from abridging freedom of the press, which formed the basis of the First Amendment, Madison said:

> "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of Government." (Id. at 738)

It is thus plain that the purpose of the First Amendment was to prohibit Congress from resorting to any delegated power or "necessary and proper" theory as a basis for authority for regulation of speech or press, and this, of course, is what the words of the First Amendment state as clearly as words can state anything:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Madison, indeed, early had occasion to reiterate this fact, when he said, during the discussion of the Alien & Sedition Acts:

"Under any other construction of the Amendment relating to the press than that it declares the press to be wholly exempt from the power of Congress the Amendment could neither be said to correspond with the desire expressed by a number of the states nor be calculated to extend the ground of public confidence in the Government." (Elliott, The Virginia and Kentucky Resolutions of 1798 and 1799 (1832), as quoted in Hart, *op. cit.*, p. 423.)

(2) *The purpose of the First, Ninth and Tenth Amendments is subverted if speech and press can be regulated by the Federal Government as incidents to exercise of the commerce, postal or importation powers.*

It is apparent that the First Amendment's prohibition becomes meaningless if the power which it most explicitly denies to Congress can be wielded as an auxiliary of one of the enumerated powers. The command of the First Amendment cannot be effective unless it is construed to subtract from each such enumerated power of Congress any authority to regulate speech or press.

It has been recognized since the case of *Gibbons v. Ogden*, 9 Wheat. 1 (1824), that the commerce power is restricted by the "plain terms" of "limitations * * * prescribed in the Constitution." Congress may not in the course of regulating commerce impair the rights of speech or press. *National Labor Relations Board v. Ford Motor Co.*, 114 F. 2d 905, cert. denied 312 U. S. 716 (1941).

Likewise, in *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937), although the majority found no impairment of free speech in the specific situation litigated, the underlying doctrine of Constitutional law which the Court applied was stated by the dissent as follows:

> "* * * Those liberties enumerated in the First Amendment are guaranteed without qualification, the object and effect of which is to put them in a category apart and make them incapable of abridgement by any process of law * * *" (301 U. S. 103, 135)
>
> "The grants of the Constitution always are to be read in the light of the restrictions. Thus, the exercise of the power to make laws on the subject of bankruptcies, the exercise of the war powers, of the power to tax, of the power to exclude aliens, or of the power to regulate commerce, is each subject to the qualified restrictions of the Fifth Amendment * * * as each, also, is subject, so far as appropriate, to the unqualified restrictions of the First," (301 U. S. 103, 136)

It is equally clear that the First Amendment restricts what can be done under the postal power. This Court, in *Hannegan* v. *Esquire*, 327 U.S. 146 (1946), has approved the doctrines expounded by Justices Holmes and Brandeis in dissenting opinions in *United States, ex rel. Milwaukee S.D. Pub. Co.* v. *Burleson*, 255 U. S. 407 (1920):

> "* * * [T]he postal power, like all its other powers, is subject to the limitations of the Bill of Rights * * * Congress may not, through its postal police power, put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This court also stated in Ex parte Jackson, that 'liberty of circulation is as essential to that freedom as liberty of publishing * * *'" (Brandeis, J., *Id.* at 430.)

and that:

> "The United States may give up the Post Office when it sees fit; but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. * * *" (Holmes, J., *Id.* at 437.)

To the same effect see *Ex Parte Jackson*, 96 U. S. 727 (1877); *Pike* v. *Walker*, 121 F 2d 37, cert. denied, 314 U. S. 625 (1941).

Indeed, early in the history of the Republic, the restriction on the postal power necessarily resulting from the First Amendment was dramatically asserted, when President Jackson asked for a law prohibiting the use of the mails for publications intended to instigate the slaves to insurrection. The Senate refused so to legislate. Senator Calhoun, in the Committee Report said:

> "The committee fully concur with the President * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it.
>
> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law * * *
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads * * * The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The Committee refer to the amended article of the constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the president * * *"
>
> S. Rep. 118, 24th Cong., 1st Sess. 1-3. (1836)

This view was concurred in by Senators from both North and South (all men raised during the formative period immediately after the adoption of the First Amend-

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IN THE

Supreme Court of the United States

October Term, 1956

No. 258

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

The Interest of the Authors League

The Authors League of America, Inc. is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

We respectfully submit that the statute involved (18 U. S. C. 1461, 1462)—prohibiting the mailing of "obscene" literature—is unconstitutional for the reasons urged by Judge Frank in his concurring opinion. Such prohibitions cannot be reconciled with "opinions of the Supreme Court uttered within the past twenty-five years relative to the First Amendment as applied to other kinds of legislation" (237 Fed. 2d 796, 802). The statute troubled Judge Frank in two respects: first, there is no reasonable probability that obscene publications tend to have any effect on the behavior of normal, average adults; and second, that punishment is inflicted for provoking in such adults undesirable thoughts rather than dangerous or anti-social acts.

We respectfully urge that, for the reasons hereinafter discussed, present judicial interpretations of "obscene" are unconstitutional because unduly restrictive of freedom of expression in their operation; and that it is possible to deal with the problem of "obscene" literature and preserve this freedom.

I.

Present judicial definitions of "obscenity" unreasonably restrict freedom of the press.

> "(For) the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (*Bridges* v. *United States*, 314 U. S. 252, 263)

Realization of the ideal embodied in the First Amendment has until now been frustrated by the necessity of denying protection to certain "well defined and narrowly limited classes of speech," one of which is the "lewd and obscene" (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571). Unfortunately, the "lewd and obscene" has not proven, in operation, to be a "well defined" class of speech.

In theory, everyone might agree that a particular book is so unspeakably filthy, so socially useless, that it should be prohibited. In practice, such a consensus is never reached on any given work; it has proven impossible to reach agreement on the definition and concept of "obscenity" or the purpose of prohibiting it.

Judicial approach to the problem has come, generally, from two directions: the first, represented by the decision in *Besig* v. *United States*, 208 Fed. 2d 142; the second, reflected in Judge Hand's opinion in *United States* v. *One Book Entitled Ulysses*, 72 Fed. 2d 705.

The Restrictive Besig Test

In *Besig*, the Court reiterated a venerable definition of "obscene":

> "* * * the word symbol for indecent, smutty, lewd or salacious references to parts of the human or animal body or to their functions * * *" (208 Fed. 2d at p. 145)

The prohibition is drawn in terms of forbidden themes, indelicate language or treatment, and offensiveness:

> "Yet we risk the assertion that there is an under-

> lying, perhaps universal, accord that there is a phase of respectable delicacy related to sex, and that those compositions which purposely flaunt such delicacy in language generally regarded as indecent come under the ban of the statute." (Id. p. 147)

There is no such "accord," nor would one be consistent with the First Amendment; on the contrary, it would contradict "the very basis of a free society, that of the right of expression beyond the conventions of the day." (*Hannegan* v. *Esquire*, 327 U. S. 146, 160.) This view that speech may be restricted for transgressing standards of delicacy offers a sharp contrast with the concept that the First Amendment "does not speak unequivocally" and is a "command of the broadest scope"; it also stands in utter contradiction of the view expressed by Mr. Justice Jackson in *Board of Education* v. *Barnette*, 319 U. S. 624

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." (pp. 641-2)

As Judge Hand had demonstrated earlier in *Ulysses*, a test drawn in the broad terms of the *Besig* definition indiscriminately outlaws classics and scientific texts, as well as innumerable books, plays and motion pictures of varying degrees of inoffensiveness and literary value—in complete defiance of common sense and the First Amendment. (Cf. *Winters* v. *New York*, 333 U. S. 507, 509.)

The effect of any definition of "obscenity" extends beyond the courtroom to a degree unparalleled in most other areas of the law; particularly when rights of free speech and press are subjected to strong pressures from law enforcement agencies, or from private organizations devoted to making unavailable to an entire community books, plays and motion pictures which offend their respective political, social or religious views.*

In such instances, the very broadness of definition becomes a coercive force, employed by officials to compel booksellers and distributors to discontinue the sale of books which the officials or private groups may find "offensive". The pressures are irresistible because the bookseller has no personal stake in a particular work which would warrant the cost of defending an action or the risk of conviction and possible loss of business; and because the scope of the statute is so wide that no one can predict its application to a particular book, and lastly, because it is applied without the mediating influence of a court.

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* The Report of the Select Committee on Current Pornographic Material (H. R. 2510, 82nd Congress, 2nd Session) contains testimony of a Detroit police officer who reported the complete success of efforts by the Police Department and the District Attorney to induce book distributors in Detroit to discontinue selling all pocket size editions which these agencies believed violated the Michigan Obscenity Statutes. The Police Inspector testified that his department operated "under the State law, insofar as the literature is concerned" (50), that up to the time of his testimony they had not been required to prosecute any pocket sized books in court because "they have always been withdrawn voluntarily" (53), and that the "result has been very gratifying to us because we feel that voluntary censorship on his part is the ideal method of suppression." (54-55).

The Liberal Ulysses Test

The Court of Appeals for the Second Circuit, was in *Ulysses,* sorely troubled by the consequences of prohibiting any work which contained "obscenity" in the dictionary sense; too many great books would fall under such an axe. As Judge Hand noted, many of the classics contained much that would be condemned as "obscene" under any definition (72 Fed. 2d 705, 707).

In an effort to escape these restrictive and unreasonable consequences, Judge Hand held that a work must be considered as an entity and could not be condemned as obscene unless "taken as a whole (it) has a libidinous effect" (72 Fed. 2d 707).

If libidinous effect is to be the test, it would seem irrelevant whether the result were achieved by a book in its entirety or only by portions of it.

Under Judge Hand's test, literary merit becomes significant; "relevancy of the objectionable parts to the theme, (and) the established reputation of the work in the estimation of approved critics, are critical criteria" (72 Fed. 2d 705, 708). But such considerations do not jibe with the holding in *Winters* v. *New York,* 333 U. S. 507, 510, that even "works of no possible value to society . . . are as much entitled to the protection of free speech as the best of literature."

Because the *Ulysses* test represents a far less restrictive approach to the problem than did the concept typified by *Besig,* the Authors League, in *Butler* v. *Michigan,* 352 U. S. , 77 Sup. Ct. 524 urged that the Court accept this definition.

However, *Butler* v. *Michigan*, permitting consideration of the problem uninhibited by concern that a solution would limit the right to protect minors and Judge Frank's opinion, embolden us to suggest that there are other factors which may be considered in determining the boundaries of "obscene" as a "well defined and narrowly limited class(es) of speech."

II.

The clear and present danger test would not provide a constitutionally valid definition of "obscene".

In *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. R. 101, it was suggested that a book could be proscribed only upon demonstration "beyond a reasonable doubt" of a causal connection between the book and criminal behavior. Judge Frank believed that the test should be modified by stressing "the element of probability in speaking of a 'clear danger,'" in accordance with *Dennis* v. *United States*, 341 U. S. 494.

However, we submit that this test is not an appropriate one for coping with the problem of "obscene" literature any more than it would be relevant in defining libel or slander. In *Dennis* v. *United States*, the defendants were convicted for uttering or conspiring to utter speech prohibited by the Smith Act. The clear and present (or probable) danger test was not employed to define or describe the prohibited speech; rather it was employed to determine

whether the defendants should be punished for having uttered the speech:

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case." (341 U. S. 494, p. 513)

Here the first question is not whether there is a danger that a specific class of speech will cause a particular punishable result. Rather, it is: what is that class of speech? What is meant by "obscene"?

Even if the probable danger standard were used, it would not provide a definition of the class of speech banned by the statute (or by any state enactment prohibiting "obscene" literature).

If a book is to be banned as obscene whenever there is a probable danger that it would cause "criminal" behavior, then the definition becomes broad (and ambiguous) enough to include anything which is found, as a matter of fact, to provoke the undesirable conduct. There are many stimuli which could produce such conduct, and of these, most do not fall within any current definition of obscenity. (237 F. 2d 812)

Application of the probable danger test would leave the critical issue to be determined by the court: whether the First Amendment protects the "(speech) which constitutes the violation of the statute" (341 U. S. 494, 513). Indeed, all issues would be taken from the jury because "probability of danger" becomes the means of defining "obscenity" and the existence of probable danger "must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case" (341 U. S. at 513).

This consequence is underscored by Mr. Justice Douglas in his dissent in *Dennis* v. *United States*:

> "I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce* v. *United States*, 252 U. S. 239, 244, to be a jury question. Mr. Justice Pitney, speaking for the Court, said, 'Whether the statement contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial'" (341 U. S. 494, p. 587).

If the theory of statutes punishing the obscene is that such speech must be suppressed because it constitutes an incitement to illegal conduct, then the statute here falls for failure to define any such proscribed conduct. Moreover, the ordinary statute punishing incitement would require, for conviction, proof beyond a reasonable doubt that the words used might produce the conduct. It is in connection with such a prosecution, but not in connection

with a prosecution under the instant statute, that the clear and present danger test may have application.

The principal weakness of the probable danger test is that:

> "No one can now show that with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults" (237 Fed. 2d 802).

The Appendix to Judge Frank's opinion is most convincing in its demonstration (pp. 806-827) that there is no factual basis for assuming a causal connection between reading "obscene" literature and the behavior of normal average adults. In the absence of conclusive evidence, books should not be condemned, no less defined as obscene, because of a "probability" that they would cause anti-social conduct.

> "So long as this Court excercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'" Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress." (Mr. Justice Black dissenting in *Dennis* v. *United States*, 341 U. S. 494, 580)

It is almost self-evident that an average, normal adult could not be activated by a book to commit a sexual crime or similar act (by definition, any person so stimulated would not be normal). And a statute aimed at proscribing literature or other means of expression to all adults because

of a possible effect upon abnormal or unbalanced members of the community, would be guilty of the same infirmity which was condemned in *Butler* v. *State of Michigan, supra.*

Certainly, neither the trial judge nor the jurors below were so affected by the material mailed by petitioner. Offended, they may have been; compelled to criminal acts, they were not. Indeed, if a jury is representative of the normal adult community, and probable danger were a fact, it would be impossible for them to hear evidence in any case involving obscene literature punishable under Judge Frank's rule.

III.

Freedom of expression should be unequivocally secured so long as it does not destroy the right of privacy.

If there is no reasonable basis for assuming causal connection between "obscene" works and adult behavior, then there is no purpose in considering that relationship in any definition of a class of proscribed speech or press. In fact, most judicial approaches to the problem did not seem to be based upon any real concern for the prevention of possible resulting "conduct."

Rather, efforts by the community against the "obscene" —through statutory action and judicial definition—seem to strive for three objectives.

The first is to prevent impure thoughts—either to compel "respectable delicacy" in accordance with *Besig*, or to prohibit inspiring "libidinous effect", as suggested in

Ulysses. As Judge Frank has stated, restrictions on thought *per se* cannot be reconciled with the First Amendment. A majority of the community may find a particular book, picture or play repulsive because of its "obscene" content and may be shocked by the fact that other adults derive pleasure from such objects, but under the First Amendment these reactions do not furnish a basis for preventing anyone from reading the book, seeing the play, or contemplating the picture.*

The second objective is the protection of minors against corruption by obscene literature. As *Butler* v. *Michigan* indicates, this is a problem which can and should be treated separately and an appropriate definition of "obscene" need not be affected by fear of opening the door to matter dangerous to the morals of children.

Lastly, society strives in its campaign against the "obscene" to allay an underlying fear that without protection, sights and sounds will be forced upon people who do not wish to see or hear them, under circumstances in which there is no opportunity for rejection. In other words, a fear that society, unprotected, would be subjected to literary and artistic "indecent exposure."

We respectfully submit that there are limits within which this purpose can be legitimately secured without restrict-

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* Undue concern for the moral welfare of less fortunately situated members of the community seems to constitute a strong incentive for efforts at suppression. Prosecutions and enforcement campaigns are often directed at cheap paper-backed editions of a novel but not at the more expensive hard cover or "trade" editions which sell at many times the price (Cf. H.R. 2510, 82nd Congress, 2nd Session). Similarly, efforts were made over the years to suppress "burlesque" in large cities, although higher priced entertainment in the theatre and night clubs offered precisely the same "attractions" as did lower priced burlesque.

ing freedom of speech and press; that the purpose can be accomplished by placing the emphasis upon securing the right of privacy rather than on suppression of any form of expression because of its content.

In *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, Mr. Justice Douglas, dissenting, said (at pp. 468-469):

> "The present case involves a form of coercion to make people listen. The listeners are of course in a public place; they are on street cars travelling to and from home. * * * in a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands. Compulsion which comes from circumstances can be as real as compulsion which comes from a command.
>
> "* * * One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel.
>
> "* * *
>
> "One who tunes in an offensive program at home can turn it off or tune in another station as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the street car has no choice but to sit and listen, or perhaps to sit and try *not* to listen."

We submit that these considerations are applicable to the problem of restricting "obscene" speech and press.

Ordinarily, a book is a private matter; its contents are concealed between covers and are available only to those who choose to open and read it. Unless they are forced

upon members of the community, without any choice on their part to hear or reject, there should be no suppression. If, for example, passages from an obscene book were read over a loud speaker, there would be ample basis for punishing that act without suppressing the sale of the book in book stores (Cf. *Kovacs* v. *Cooper*, 336 U. S. at pp. 104-105).

Similarly, the community may be entitled to ban the display in public places, e.g., newsstands and stores, of magazine covers containing pornographic illustrations or pictures; or the posting in public places of billboards containing obscene photographs advertising motion pictures or plays. In either circumstance, the State would have a legitimate interest in protecting the right of its citizens not to be exposed to obscene sights (or sounds) on public places. However, no purpose would be served in suppressing the sale of the magazine because of its contents, or the motion picture thus advertised because of its dialogue or subject.

The same considerations applicable to literature should apply to motion pictures, the stage, and other media of communication and entertainment. No adult is compelled to see a motion picture or a play; and in that sense these media do not involve invasion of privacy any more than books do.

However, the chief distinction between these media is that books only involve speech, whereas motion pictures and plays employ both speech and action. Concern has been expressed that theatre audiences might be exposed to acts (as distinguished from words) which were obscene. This should not present any problem, since acts could be pro-

scribed if they constituted indecent behavior or exposure, without impairing freedom of expression.

In *Public Utilities Commission* v. *Pollak,* 343 U. S. 451, Mr. Justice Douglas (dissenting) said at page 469:

> "The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy, today violated, is a powerful deterrent to any one who would control men's minds."

We are respectfully suggesting here that people should be "let alone in those choices" for as Mr. Justice Douglas has declared:

> "The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy." (dissenting in *Dennis* v. *United States,* 341 U. S. 494, 590)

That maturity of judgment is not a myth; its soundness has already proven effective in several areas of speech and press. Books published in regular or "trade editions" compete for public approval solely on the basis of merit. Success results from critical acclaim; and seldom is an effort made to exploit in suggestive or sensational manner the contents of books. Almost invariably, advertisements

contain only the title, the names of the author and publisher, and occasionally excerpts from reviews.

Similarly, the legitimate theatre makes its appeal to the public on the basis of merit. Theatrical advertising is limited in the same manner; and the public makes its choices as a consequence of the nature and content of plays, the reactions of the critics and the general public.

We respectfully submit that the problems of prohibiting the "obscene" have been overly complicated by a reluctance to trust the judgment of individual members of the community and to recognize the essential fact that taste (and sensual reactions) cannot be determined by legislation:

> "For indecency and vulgarity the fundamental remedy is the culture of audiences and readers, and the protests of critics. Jeremy Collier cured the profaneness and immorality of Restoration drama without any official authority. But the censorship, established not to clean up the stage, but to muzzle Henry Fielding, one of the greatest of British authors, made the theatre the most stagnant cultural institution in the country." (G. B. Shaw, "*Everybody's Political What's What?*", pp. 198, 199).

CONCLUSION

It is respectfully submitted that the conviction should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF GREENLEAF PUBLISHING COMPANY AND HMH PUBLISHING CO., INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF.

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ment). See in particular comments of Webster, Clay and Davis, and debates, *passim*, Cong. Globe, 24th Cong., 1st Sess. 36, 150, 164, 165, 347, 348, 351, 354, 539.

It was not until 1825 that the Congress declared the postal service a monopoly and no longer permitted private competition (4 Stat. 102).

Indeed one notes that for almost a century after the adoption of our Constitution no Congress presumed upon the powers of the States to invoke the postal or interstate commerce powers in order to regulate the flood of scurrility which filled the newspapers of the nineteenth century. Scurrility of that era was as objectionable as "obscenity" in ours but Congress preferred to endure scurrility rather than to attempt to arrogate to itself a Federal power which it did not have.

In the Tariff Act of 1842 Congress for the first time applied the label "obscene" to material. Act of Aug. 30, 1842, 27th Cong., 2d Sess., 5 Stat. 566. The statute prohibited the importation of "obscene prints, paintings, lithographs, engravings and transparencies", but excluded books and other printed textual matter from the ambit of that prohibition. This even though in this same tariff act a tariff was levied on books. Thus the Congress recognized the same limitation in 1842 when examining the power over foreign commerce as it had recognized in 1836 when dealing with the postal power. In that era of the development of the Printed Arts, Congress had not yet come to realize that both Pictures and Books fall in the same sacred area of Ideas *Qua* Ideas.

(d) Power over speech and press is in the States alone.

The First Amendment imposed a limit on Federal power. The rights of the people and State powers not granted to the Federal government were explicitly reserved by the Ninth and Tenth Amendments. Such reservation was made explicit because the States were apprehensive of the abuse of power by the *national* government. As the constitutional historian Charles Warren has commented, opposition to ratification of the Constitution stemmed from

> "their profound belief that it was intended and framed to bring about a consolidation and ultimate destruction of the States and State sovereignty."
>
> (The Making of The Constitution, 753.)

To allay these fears, specific limits on Federal power were devised by the Bill of Rights. The States alone were given the power to balance the interests of free speech and press against the demands of morality. Yet the Federal government now claims just such authority. Mr. Justice Frankfurter has recently reminded us it was Jefferson's view that the Federal government had no such power:

> "* * * [T]he gravamen of the attack in the Virginia and Kentucky Resolutions against the Alien and Sedition Acts of 1798 was that they infringed on the rights of the states and were promotive of 'a general consolidated government.' It deserves to be recalled that even Jefferson attributed to the states the power which he denied to the federal government. 'Nor does the opinion of the unconstitutionality and consequent nullity of that law—the [Sedition Act]', he wrote * * * 'remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue,

all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. * * * While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.' "

("John Marshall and the Judicial Function" 69 Harv. L. R. 217, 225-226 (1955).)

And this was the view generally held by Republicans opposing the Sedition Act. They

"* * * regarded the punishment of libels and seditious speech and writings as a province of the states rather than of the Federal government. Nathaniel Macon declared that 'the liberty of the press was sacred'—but he meant only as against the Federal government, not against the states. Indeed, as he added, 'the states have complete power on the subject.' "

(Miller, Crisis in Freedom, 168-169 (1951).)

This viewpoint, so strongly expressed by Thomas Jefferson and others of our earlier statesmen is fortified by examination of the record of the First Congress.

(1) *An Amendment to forbid State regulation of speech and press was rejected.*

When Madison presented the draft of the Bill of Rights to the First Congress he proposed two separate provisions to deny authority over the rights of speech and press—one running against the general government, one against the States. The House adopted limits on both Federal and State power, the State provision reading:

"The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any state."

(1 Annals of Congress 755)

The amendment restricting the States failed of adoption in the Senate. The ground on which the proposal was opposed in the House by Mr. Tucker of Virginia was:

> "It will be much better to leave the state governments to themselves, and not to interfere with them more than we already do * * *" (*Id.*, at 756)

As a result of the action of the Senate, the First Amendment, a clear restriction of the power of Congress, was presented to and adopted by the States. But the power of the States remained unimpaired.

(2) *The Ninth and Tenth Amendments reiterate State power.*

Just as they feared that the absence of delegated power over speech and press would not without more explicit prohibition suffice to prevent Federal encroachment, the drafters of the Bill of Rights considered a positive declaration of reserved powers imperative. The Ninth and Tenth Amendments were designed to achieve this purpose, to make explicit that the reverse of the coin—restriction on Congressional power—was reaffirmation of State power. Thus, as expressed by Mr. Hartly on the floor of the House:

> "It had been asserted in the convention of Pennsylvania, by the friends of the Constitution, that all the rights and powers that were not given to the Government, were retained by the states and the people thereof. This was also his opinion, but as four or five states had required to be secured in those rights by an express declaration in the Constitution, he was disposed to gratify them. * * *" (*Id.*, at 732)

And Madison said:

> "I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several states. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it." (*Id.*, at 441)

By adoption of the Ninth and Tenth Amendments, therefore, it was determined that the States and the States alone had the power to regulate speech and press.

The basic differences which were intended between State and Federal functions as to speech and the press were indicated by Mr. Justice Jackson in his dissenting opinion in *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952), where Justice Jackson stated:

> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquility. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power, such as protection of interstate commerce.
>
> "When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.

> "For these reasons I should not, unless clearly required, confirm to the Federal Government such latitude as I think a State reasonably may require for orderly government of its manifold concerns."

The States have power over and responsibility for moral good order—accordingly there is State power to determine the limits on speech or press which morality may require. But the power and responsibility is that of the States alone; this is not a function of the national government (*Id.*, at 294). *Cf. Palko* v. *Connecticut*, 302 U. S. 319 (1937); *Gitlow* v. *New York*, 268 U. S. 652 (1925) (Dissenting opinions of Holmes and Brandeis, JJ.) (But see limitation noted in Point III).

(3) *Nationwide standards for judging "obscenity" do not exist.*

The wisdom of our Federal structure becomes apparent when we consider the anomalous results of an abuse of that structure—Federal obscenity legislation. Each State has enacted a complex of laws governing individual morals; the pattern of these laws varies in accordance with local custom and tradition. Societal mores and laws governing marriage, divorce, non-marital relations, profanity and other aspects of human activity which are components of the basic concepts of morality can and do vary from State to State.

The "mores of the community"—the standard against which the cases tell us "obscenity" must be tested—are inevitably the result of the interaction of these and other local factors. Within a given state there is perhaps basis for distilling a community attitude. But what possible basis is there for postulating "community mores" coextensive with the entire United States? In the variety lies our cultural wealth.

In a Southern state, where miscegenation laws are enforced, a description of interracial social activities might be deemed immoral; the same description be wholly inoffensive to a community in the North. Artistic expression considered shocking in remote rural areas may be deemed passé in large urban centers. On the other hand, everyday occurrences in the stables or the fields may shock those who are unfamiliar with animal husbandry. The diversity of mores and folkways in our many States safeguards us against a stultifying conformity. In aid of this diversity the Constitution must be read to proscribe the imposition of such conformity by Congressional fiat in the area of "obscenity". Facilities of travel and communication are the instruments of uniformity.

The simple fact is that as concerns moral attitudes, there is no national "community" and no basis in our Constitutional scheme for the development of any nationally uniform standard. The idea of a uniform nationwide consensus of moral values is a disturbing fiction particularly if imposed. So also was the fiction of Federal "common law" which was prophetically designated by Justice Holmes, in his dissent in *Black & White Taxicab* v. *Brown & Yellow Taxicab*, 276 U. S. 518 (1927) where at p. 534 he reminded the Court of the Federal judiciary's "unconstitutional assumption of powers * * * which no lapse of time or respectable array of opinion should make us hesitate to correct." The fiction of Federal general law was later held to be an unconstitutional basis of Federal judicial power in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). I suggest to the Court that the fiction of a national community of moral attitudes is equally an unconstitutional basis for Federal power.

(4) *Federal obscenity law interferes with the power of the States to mold the moral standards of the community.*

The Federal statutes purport to determine what printed matter may be mailed from a point in a given State to a destination which is within that State, in another State or in a foreign country; what may be received in a State of destination for distribution in that State; and what may be transported by common carrier from one State to another. As a result a Federal jury in New York may ban from the mails printed matter addressed to citizens of New Mexico, even though the State of New Mexico is wholly willing to permit its circulation there. Clearly the sovereign power of the State of New Mexico is infringed if such printed matter is adjudicated non-mailable under Federal law. Such a result is in clear violation of the First Amendment, which was intended to exclude Federal regulation of speech and press in this area.

The result is even more striking if we consider an instance in which the State itself—through the instrumentality, for example of a State university—may be prevented by Federal law from bringing literature into the State. This is not a remote possibility: "obscenity" prosecutions have been brought based upon educational literature dealing with sexual relations, which literature might well be used by State agencies. (*United States* v. *Dennett*, 39 F. 2d 564 (1930); *Walker* v. *Popenoe*, 149 F. 2d 511 (1945).)

More important, and indeed all important, is the valued use of our 48 separate experimental laboratories—our sovereign states—48 geographic areas evidencing varying cultural attitudes toward matters sexual; areas which have their highest value in these terms rather than in economic or geographic dimensions. To impress one uniform censor on these varying folkways cannot be consistent with the

concept of a Federal Government. The *Federal* concept imbedded in the Constitution demands the enrichment of comparative judgments and an emotional and spiritual free enterprise.

The needed diversity is easily illustrated. One need only look at the wide gap between the culture—Irish overlaid on Puritan—of New York and Boston which bespeaks a totally different standard of acceptance or rejection of matters sexual than does the Latin folkway of New Orleans. For example, also, one may note the conflicting pronouncements on the morality of the same book or motion picture which are made by civic or religious leaders in different localities throughout the nation. But all these variations pay tribute to the concept of Federalism in the Constitution and demand the persistence of that concept in matters of the mind. In this area, this Court has ever been cognizant of what in the vernacular is called "States rights", the concept that in a nation so vast the Founding Fathers negated in the Constitution any theory of a nationwide control of matter of the mind.

This area is removed from Federal power. The sedition area may even be preempted to the Federal Government while "merchandise words" may reside in State and Federal control.

POINT III

The power residing in the states over speech and press is not beyond all federal control.

This Court, as the ultimate guardian of the guarantees of the First Amendment, not only has the duty to enjoin any unlawful abridgement by the Federal Government of such guarantee; it also has the duty to the people of the Republic to protect against any attempt by the States to impose unreasonable restraints upon freedom of speech and press. Such is the command of the Fourteenth Amendment.

While it is recognized that the States possess the power to legislate with respect to the mores of the community, it must not be overlooked that such legislation is subject to the test of compliance with the First Amendment. The Fourteenth Amendment is the instrument for effectively protecting the people against the power of any State to tamper with their rights in speech and press. Upon its proclamation was finally satisfied the demand of Madison and other members of the First Congress for the addition to the Bill of Rights of a specific prohibition applicable to the States, against their abridgement of the First Amendment freedoms.

Just as the Federal authority has the Constitutional duty to prevent the establishment of non-republican institutions in the States flowing from the guarantee of a republican form of government, so also the National Government has the Constitutional power, and indeed the duty, to protect the people from encroachments by the States against the freedoms of speech and press. This Court must continue to invalidate unconstitutional limitations of speech and press imposed by the States. Should this Court

not carve out as unabridgeable the idea *qua* idea area discussed in Point I the States may in the future find themselves in a position where they may desire to invoke Federal aid in the maintenance of Constitutionally approved local standards. Such Federal assistance has a precedent; it was obtained in support of local standards governing the consumption of liquors within a given State. As a State may prefer to remain dry despite the fact that its neighbors consume liquors, so likewise a State may prefer not to have its citizens receive certain "obscene" printed or visual materials which are transmitted from another State but in the State of delivery are lawfully banned. In such circumstance, the State of delivery may call upon the Federal government for assistance. Cf. *James Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U.S. 311 (1917).

The Court is undoubtedly aware of an analogous provision of the Postal Regulations whereby the most local authority, the parent, may invoke the aid of the postal authorities in order to control the delivery of mail to his child. (See Post Office Circular 2, 12-1-54 154.22).

POINT IV

If the Federal Government does possess power in this area, the Federal obscenity statute is unconstitutional in that it violates the First and Fifth Amendments.

(a) Freedom of expression is the rule.

Even if Federal power over the subject matter of speech and the press be conceded, the statute supporting the indictment in this case is unconstitutional under the First Amendment. Through a complex of obscenity laws as noted in Point II the government has imposed direct regulation over the contents of the media of expression. Such power, it is well established, may be exerted only under exceptional circumstances.

> "The basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. These principles make freedom of expression the rule." (*Burstyn* v. *Wilson*, 343 U. S. 495) (1952); See also *Herndon* v. *Lowry*, 301 U. S. 242 (1936); *Thomas* v. *Collins*, 323 U. S. 516 (1944); *Winters* v. *New York*, 333 U. S. 507 (1948).

A narrow category of such exceptions has been recognized by the Supreme Court. These were summarized in this case below by Judge Frank, concurring as follows:

> "Any statute authorizing governmental interference (whether by 'prior restraint' or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite to a breach of the peace, or with sufficient probability tend either to the overthrow of the government by illegal means or to some other overt anti-social conduct." 237 F. 2d at 802.

There is as is set forth in the Appendix to this Brief ground to hold that the anti-social conduct aimed at has not been identified and that publications considered to be obscene do not lead to any identified anti-social conduct.

A publication may be constitutionally suppressed only if the government sustains the burden of proving that it contains material which incites to anti-social conduct sufficiently dangerous to justify the exceptional remedy of suppressing free speech. The government must prove clear and substantial danger of anti-social conduct and must make a showing of high probability that such anti-social conduct would take place if the publication were not suppressed.

> "In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (*Dennis* v. *United States*, 341 U. S. 494).

The government has the burden of justifying any restraint on speech or press. *Burstyn* v. *Wilson, supra; Thomas* v. *Collins, supra; West Virginia Board of Education* v. *Barnette*, 319 U. S. 624; *Dennis* v. *United States, supra.* There is no presumption of the constitutionality of a statute which impinges on these freedoms; on the contrary "the State has a heavy burden." (*Burstyn* v. *Wilson, supra*). Moreover • • • "When legislation appears on its face to affect the use of speech, press or religion, and when its validity depends on the existence of facts not proved, their existence should not be presumed." (*Busey* v. *District of Columbia*, 138 F. (2) 592 (1943).

In the Appendix to this Brief we have set forth an analysis of sociological and psychological data indicating the absence of any causal relationship between reading sexually stimulating material and overt anti-social conduct. This was also the conclusion of Judge Frank who, after

an exhaustive study of this question, found in this case that:

> "To date there exists, I think, no thoroughgoing studies by competent persons which justifies the conclusion that normal adults' reading or seeing of the 'obscene' probably induces anti-social conduct. Such studies do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that 'obscenity represents a ponderable causal factor in sexually deviant adult behavior. 'Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort to genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior.' What little competent research has been done, points definitely in a direction precisely opposite to that assumption.
>
> "Alpert reports that, when, in the 1920s, 409 women college graduates were asked to state in writing what things stimulated them sexually they answered thus: 218 said "Man"; 95 said books; 40 said drama; 29 said dancing; 18 said pictures; 9 said music. Of those who replied that the source of their sex information came from books, not one specified a 'dirty' book as the source. Instead, the books listed were: The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal diseases, medical books, and Motley's *Rise of the Dutch Republic.*' "

For the full statistical analysis of these figures, see Ernst and Seagle, *To the Pure . . .*, Chapt. XII, An Appeal to Science, pp. 234ff. (1928).

(b) "Obscene" cannot be defined.

Due process of law requires that a defendant know with some certainty of what he is accused (see (f) below). The case law of obscenity is remarkable for its failure to define what is supposed to be prohibited. Many courts and commentators have attempted to define the concept; all have inevitably failed. An objective student of the precedents cannot fail to agree with Judge Frank that:

> "If anyone regards as precise the standard in the obscenity statute, he cannot have read the pertinent cases." (*Roth* v. *Goldman*, 172 F. (2) 788 (1949).)

To the same effect see *Parmelee* v. *United States*, 113 F. (2) 729 (1940); *Bantam Books* v. *Melko*, 14 N. J. 524; *United States* v. *Roth*, 237 F. (2) 796 (1956).

See also *State* v. *Lerner*, 51 O. L. A. 321 (Ohio 1948), 81 N. E. (2) 282, 286 (1948).

> "Obscenity is not a legal term. It cannot be defined so that it will mean the same to all people, all the time, everywhere. Obscenity is very much a figment of the imagination—an indefinable something in the minds of some and not in the minds of others, and it is not the same in the minds of the people of every clime and country, nor the same today that it was yesterday or will be tomorrow."

The reasons for the inability of the courts to define obscenity have been aptly diagnosed by the Court of Appeals for the District of Columbia in *Parmelee* v. *United States, supra*, where the court said:

> "Probably the fundamental reason why the word 'obscene' is not susceptible of exact definition is that such intangible moral concepts as it purports to connote vary in meaning from one period to another."

(c) "Obscenity" depends on an infinity of variables which render the law completely uncertain.

As a result of their inability to define "obscene" the courts have, in effect, delegated the problem to the triers of fact. Juries or judges determine the extent to which "intangible moral concepts" shall be invoked to suppress rights guaranteed by the First Amendment. As Judge Hand has stated "obscenity is a function of many variables * * * and the verdict of the jury is * * * really a small bit of legislation ad hoc * * *" (*United States* v. *Levine*, 83 F. (2) 156 (1936)).

Under the Federal obscenity laws a very large number of variables may affect the fate of a publication. There are no standards adequate to prevent the trier of fact in any particular case from basing his judgment on his own subjective reactions. Preliminary to submission of the case is the determination to prosecute which, like the ultimate verdict, is bound by no precise limitations, and can, of course, be made on the basis of wholly extraneous factors. When the case goes to the triers of fact the ultimate result becomes anyone's guess, since the triers have virtually unlimited discretion to determine the law. In the first instance the jury must invest with content such terms as "obscene", "salacious", "immoral", "corrupt" or any other of the synonyms adverted to by the courts as substitutes for judicial definition. Here is an immediate invitation to punishment on the basis of the subjective reactions of the jury.[1] Second, the jury must evaluate the

[1] Thus, Chafee, in Government and Mass Communications (1947) comments, at page 210:

"The subject, by its very nature, includes a large element of irrationality * * * When the facts themselves are necessarily fraught with contradictory emotions, it is hopeless to expect officials and judges to be coldly reasonable in dealing with literary representation of those facts."

publication against the standards of the community. Here again, there is uncontrolled opportunity for subjective judgment.[2] Third, since the courts admit that moral concepts change with time, the result in the case of any given work depends on when the prosecution is initiated. Fourth, since under federal law the work may be prosecuted anywhere in the United States, the result depends on where the prosecution is brought.

Thus a publisher confronted with the federal obscenity laws lacks even a remote basis for evaluating whether a work may be held obscene. There is no rational body of judicial decision; there is no basis for predicting the subjective reactions of the jury; accidents of time or geography may become determinative. He may know that certain works have been condemned in certain places. But he also knows that the same works have been cleared—in different places or at a different time. He has no means of guessing where or when his publication will be prosecuted, what the mood of the community from which a jury will be drawn may be, whether the jury will reflect what he deems to be prevailing moral standards and in any case whose moral standards they will be. In other words, he is not in a position to make even an informed guess.

Obscenity is wholly different from other fields where defendants must risk the reactions of a jury, such as

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[2]Judge Frank noted, in his concurring opinion in this case below that:

> "If, in a jury case, the trial judge does not direct a verdict or enter a judgment of acquittal, the jury exercises the censorship power. Courts have said that a jury has a peculiar aptitude as a censor of obscenity, since, representing a cross-section of the community, it knows peculiarly well the average 'common conscience' of the time. Yet no statistician would conceivably accept the views of a jury—twelve persons chosen at random—as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the 'moral sentiments' of a generation ago, not of the present time."

criminal negligence. In the instance of obscenity not only is virtually every element a variable, but the defendant's fate actually rests on the subjective evaluation by the triers of the facts of "intangible, moral concepts." The trier of facts does not evaluate conduct against a framework of objective events and apply the standard of the reasonable man. Here the triers of fact determine what should or should not be circulated.

As Judge Frank pointed out in this case below, the law authorizes "hundreds of divers jury-legislatures with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression."

(d) The uncertainty of the standard is shown by the contradictory results of recent obscenity proceedings.

Even a cursory glance at the modern history of "obscenity" demonstrates how the purported standard is variously and contradictorily applied. Thus, the novel "Ulysses" was found importable as non-obscene in 1934 (*United States* v. *One Book*, 72 F(2) 705 (1934)); previously booksellers had been convicted under the New York Penal Law for selling it.

The novel "Memoirs of Hecate County" was found obscene in a criminal trial in Los Angeles in September, 1946; a bookseller indicted for selling the same book was acquitted in San Francisco in December, 1946. The publisher of the book was criminally convicted in New York in October, 1946 and the book was found non-obscene and therefore importable by administrative action of the Customs Service in California in 1954.

Similarly, the novel "God's Little Acre" was held "obscene" in Massachusetts in 1950. It was held not to be obscene in New York in 1933 and in Pennsylvania in

1948 (See *Attorney General* v. *"God's Little Acre"*, 326 Mass. 281 (1950)).

Nudist magazines have similarly been subjected to contradictory rulings in the courts. Thus, one lower federal court in the District of Columbia found magazines published by the nudist movement "not likely to promote lustful feelings or excite the sexual passions" (See *Summerfield* v. *Sunshine Book Co.* 221 F(2) 42 (1955).) Another federal district court subsequently found the magazines obscene (*Sunshine Book Company* v. *Summerfield*, 128 F. Supp. 564 (1955)), but was reversed on appeal by the Court of Appeals for the District of Columbia (*Sunshine Book Company* v. *Summerfield*, No. 12622, May 31, 1956).[3] During the same period a lower federal court in the Eastern District of Washington banned importation of certain foreign nudist magazines (*United States* v. *4200 Copies International Journal*, 134 Fed. Supp. 490 (1955)) on reasoning comparable to that of the reversed decision of the District Court in the *Sunshine Book* case, *op cit. supra.*

It is notorious that in the field of federal administrative enforcement of obscenity laws there is wide discrepancy between rulings of the Post Office Department and the Treasury Department, although each agency is presumably charged with the same responsibility to ban "obscenity". The New Jersey Court has commented, with respect to the federal administrative picture:

> "Nowhere is the inconsistency of literary censorship more patent than in the federal field." (*Bantam Books* v. *Melko*, *supra*)

[3] Subsequently reargued before the full bench.

(e) The uncertainties of the obscenity laws render them void for vagueness under the Fifth Amendment.

On the basis of the foregoing it is submitted that the Federal obscenity statutes are unconstitutional definitions of criminal liability. The due process clause of the Fifth Amendment forbids imposition of criminal sanctions where liability is as dependent on chance as it is under these laws. As Mr. Justice Rutledge said in *United States* v. *CIO*, 335 U. S. 106 (1947) (dissenting opinion), "Blurred signposts to criminality will not suffice to create it."

This Court stated the requirements of due process in *Winters* v. *New York* (333 U. S. 507 (1948)) where a somewhat different but no more precise restraint on freedom of expression than is here involved was invalidated:

> "The standard of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanctions for enforcement. The crime 'must be defined with appropriate definiteness.' * * *. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment * * *."

Section 1461 does not measure up to these requirements. When the result depends on subjective determinations of juries, and on happenstance of history or geography, there is no "ascertainable standard of guilt." The statute involved in this case and the other obscenity statutes are classic examples of legislation whose meaning can not be guessed at even by men of common intelligence. They appear also to be precisely the type of legislation condemned by the Court in *Herndon* v. *Lowry*, *supra*, on the ground that it "licenses the jury to create its own standard in each case."

While the majority opinion in the *Burstyn* case and in *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870 (1955) rests on the principle that the standards there involved, one of which was "obscenity", were too uncertain to satisfy the First Amendment, their reasoning—that "unbridled censorship" was involved—is also applicable to the Fifth Amendment. If a standard permits "unbridled censorship" it does not define a crime with reasonable certainty.

(f) The rule of certainty is particularly important when First Amendment rights are affected.

Because the rights secured by the First Amendment are preferred in the constitutional scheme, and because they are particularly vulnerable to impairment by prosecution under loosely worded criminal statutes, this Court has subjected such laws to most careful scrutiny.

In the *Winters* case the Court held:

> "Although we are dealing with an aspect of a free press in its relation to public morals, the principles of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution."

See also *Stromberg* v. *California*, 283 U. S. 359 (1930); *Herndon* v. *Lowry*, *supra*; *Kunz* v. *New York*, 340 U. S. 290 (1950).

Under this doctrine there is clearly applicable to the standard "obscene" Justice Frankfurter's statement in his concurring opinion in *Burstyn* v. *Wilson*, *supra*, that it:

> "remains too uncertain to justify constraining the creative efforts of the imagination by fear of pains and penalties imposed by a necessarily subjective censorship."

CONCLUSION

Along the lines of the Constitutional philosophy above set forth, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

MORRIS L. ERNST

On the brief:

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March, 1957

Consents To File Brief Amicus

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March 14th, 1957

Morris Ernst, Esq.
285 Madison Avenue
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Re: Roth v. United States,
No. 582
October 1956 Term

Dear Mr. Ernst:

We hereby consent to your filing a brief amicus curiae.

Very truly yours,

David von G. Albrecht

DVGA:ig

TELEGRAM

1957 Mar 14 11:32

Morris L. Ernst
c/o Greenbaum Wolff & Ernst
285 Madison Avenue, N. Y. NY

Confirming my letter of March eleventh United States consents to your filing amicus brief on your own behalf in Samuel Roth versus US number five eight two

J Lee Rankin, Solicitor General

APPENDIX

Memorandum on the Lack of Causal Connection Between Exposure to Printed and Visual Materials and Participation in Anti-Social Conduct or Behavior

1. PRESENT STATE OF MAN'S KNOWLEDGE OF SUCH CAUSAL RELATIONSHIP

Only during the last several years have the effects of printed materials on readers been studied to any extent by social scientists. No study has been made which has shown causal connection between exposure to "obscene" printed and visual materials and participation in anti-social conduct or behavior. Moreover:

> "Although the whole subject of obscenity hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior." (Lockhart and McClure, "Obscenity and The Courts," 20 *L. & Contemp. Prob.*, 587, 595.)

Nor has it been demonstrated that youthful readers (who are often presumed to be most susceptible to influence) are affected by such material. Indeed, there has been a notable absence of results showing that any such effect exists.

> "Those who would ban books argue that particularly books make for juvenile delinquency or crime, induce violence and sadism, corrupt taste, promote sexual perversion, distort human values, subvert political loyalties, provoke disrespect for the law, produce demeaning stereotypes of groups and, in general,

make sin even more attractive than it ordinarily is. When evidence is put forward to support these claims, it is at best thin and questionable; more characteristically, it is entirely absent." (Richard McKeon, Robert K. Merton, and Walter Gellhorn, *The Freedom to Read*, 76 (1956).)

• • •

Where an effect is so out of proportion to its supposed cause the conclusion must inevitably be that other factors are of greater force.

"We start with the proposition that an interest in pornography is seemingly not the molder of a man's personality but the reflection of it. Indeed, certain psychological experiments suggest that one who finds pornographic elements in allegedly obscene books is very likely to discover them also in apparently innocuous books, through a process of self-selection and emphasis that the reader himself brings to the words. The same process of self-selection—this tendency to read and see what accords with pre-existing interests—probably controls the effects of reading as well as the determination of what will be read. The fact that 'sex maniacs' may read pornography does not mean that they became what they are because of their reading, but that their reading became what it is because of them. Their personality, according to modern scientific findings that confirm a proposition stated long ago by the Jesuit fathers, was probably basically formed before they ever learned to read." (Walter Gellhorn, *Individual Freedom and Governmental Restraints*, 61-2 (1956).)

This conclusion as it applies to the effect of "obscene" printed materials, is amply supported by the two classes of evidence into which the existing research may be divided: (1) that of anti-social behavior and sexual stimu-

lation, showing neither to be caused by printed materials, and (2) that of printed materials, showing them to cause neither sexual stimulation nor anti-social behavior. We may set aside for the moment the question of whether or not sexual stimulation is in itself a cause of anti-social behavior, an even more dubious proposition.

The sources of anti-social behavior, like the effects of reading, have been studied intensively in juveniles on the assumption that the youthful individual is more susceptible to influence than the adult and more likely to show such influence if it exists. Special attention has been given by a Congressional Committee to the relationship between juvenile delinquency and the mass media—such as television, motion pictures, and comic books—and much testimony has been elicited from social scientists and other experts in the field (see Hearings and Reports of the Subcommittee to Investigate Juvenile Delinquency, 84th Congress, Reports Nos. 62, 1466 and 2055). The effect of the testimony is to suggest great doubt that the media—especially the printed media, in this case the comic book—have a primary or causative effect in producing anti-social behavior. "Majority opinion," the Committee reported, "seems inclined to the view that it is unlikely that the reading of crime and horror comics would lead to delinquency in a well-adjusted and normally law-abiding child." (Senate Report No. 62, 84th Congress, 1st Session, p. 12).

In communications to the Committee, many experts went further:

> "* * * In 25 years of practice, which includes 10 years majoring in juvenile and adult courtwork, I have never been able to pin down a definite major fundamental causal influence between crime, violence, etc., as depicted in movies, cartoons, books, or TV, and the offen-

sive behavior encountered in delinquency * * *." (Dr. George M. Lott, University Psychiatrist; State College, Pa., June 1, 1955).

* * *

"* * * To attack the television programs and the comic books appears to me to be rather like closing the stable door after the horse has escaped * * *." (Dr. Maier I. Tuchler, San Francisco, Cal., May 24, 1955).

* * *

"* * * It is my feeling that this literature and these programs serve a positive purpose in permitting the child or youth to live through emotionally, in a vicarious manner, his aggressive needs. If the disturbed child or youth who acts out his hostility in a violent manner were not exposed to these media, some other environmental influence would tend to provoke this hostility * * *." (Dr. Samuel R. Kesselman, Neuropsychiatrist, Newark, N. J., May 25, 1955).

This last opinion—that printed material with what may superficially appear to be anti-social content may actually serve to prevent anti-social behavior rather than encourage it—is shared by Dr. Lauretta Bender, Professor of Clinical Psychiatry, New York University, College of Medicine.

"As has been well stated by J. Moodie, normal, well-adjusted children with active minds, given insufficient outlets or in whom natural drives for adventure are curbed, will demand satisfaction in the form of some excitement. Their desire for blood and thunder is a desire to solve the problems of the threats of aggression against themselves or those they love, as well as the problem of their own impulses to retaliate and punish in like form. The comics may be said to offer the same type of mental catharsis to its readers that Aristotle claimed was an attribute of the drama * * *. That they supply a real need for the child there can be no doubt * * *.

"* * * We repeat that comics are representative of the folklore of the times, spontaneously given to and received by children, serving at the same time as a means of helping them solve the individual and sociological problems appropriate to their own lives." (Dr. Lauretta Bender, *A Dynamic Psychopathology of Childhood*, 227, 229, 230 (1954).)

Moreover, in groups where both delinquency and comic-reading are found—as shown by a study of 250 New York City school boys—research reveals no correlation between the two. (Herbert S. Lewin, "Facts and Fears about the Comics," *Nation's Schools*, 46-8, 52.) In a report to the New York State Temporary Commission on Youth and Delinquency, Children's Court Judge George W. Smythe, president of the National Probation and Parole Association, submitted a list of twenty contributing causes of juvenile delinquency ranked by the number of cases in which they had appeared. No communication media, let alone reading material are mentioned; reading *difficulty* is included but ranks eighteenth. (*New York Times*, September 2, 1955). This finding is fully confirmed by a summary of studies quoted by Judge Frank:

"(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern to the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other nonactive entertainments. Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read.

"(2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and

causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any were read by the delinquents. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubts concerning the basic hypothesis on which obscenity censorship is dependent.

"(3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards * * * And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society." (Appendix to concurrence in *United States* v. *Roth*, 237 F. (2) 796, at p. 813.)

The effect of printed materials even on impressionable children has not been shown even though the medium is universally available to them, consumed by them in large quantity, and direct in its emotional impact through bold color, pictorial simplicity, and highly dramatized content. Therefore, *a fortiori*, is it difficult to show such an effect on adults, who have been exposed to a much greater amount of experience and whose moral character, good or bad, has been more firmly molded.

This conclusion is further supported by the most important study of the subject, *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate*, prepared for the American Book Publishers Council by Marie Jahoda and the staff of the Research Center for Human Relations, New York University, March 1, 1954. Dr. Jahoda finds that there "is little consensus on what constitutes a 'bad' book beyond the tautological statement that a 'bad' book is one that has a 'bad' effect," and that at the same time "assumptions made by various people on the effect of 'bad' books are often inconsistent with each other, unprecise and confusing." (*The Impact of Literature*, 16.) In summation she writes:

> "There is a large overlap in content matter between all media of mass communication. The daily press, television, movies, radio and fictional printed material all present their share of the so-called 'bad' material, varying in the degree of reality attached to these matters. It is virtually impossible to isolate the impact of one of these media on a population that is exposed to all of them. Some evidence suggests that the particular communications to which an individual exposes himself are probably in good part a matter of choice. The reader does not take in everything that is offered but mostly what he is predisposed to take. In the realm of attitudes, this means that adult people prefer to expose themselves to material which expresses attitudes they already hold. A conversion of attitudes by any of the mass media is indeed a rare event, if it occurs at all * * *" (*The Impact of Literature*, 44.)

Even if one assumes—and there is no evidence for such an assumption—that the stimulation of erotic thoughts and desires leads of itself to anti-social behavior, the few studies that have been made of such stimulation rarely

show reading matter or printed materials to have caused it. A carefully conducted survey of a group of boys between the ages of 12 and 16 showed that 85 per cent had been aroused to the extent of "genital commotion" by such varied stimuli as carnival rides, playing a musical solo, fast car-driving, and seeing a column of marching soldiers. (Glenn V. Ramsey, "The Sexual Development of Boys," 56 *American Journal of Psychology*, 217, at 222-223 (1943). Kinsey, a noted authority in this field, also reports the effects of stimulation resulting from skiing, swimming, or sitting in hot sand. (Alfred C. Kinsey, *Sexual Behavior in the Human Male*, 164-5. (1948).)

Where reading plays any role whatever, it is likely to be one of information. In the classic study of twelve hundred unmarried women college graduates made by the Bureau of Social Hygiene of New York City, 218 reported that what they found the most stimulating sexually was, as might have been anticipated, the opposite sex. As for their sources of sex information, reading represented only six per cent of it, and among the books mentioned were the Bible, the dictionary, Shakespeare, a Lydia Pinkham advertisement, and Motley's *Rise of the Dutch Republic*. (Morris L. Ernst and William Seagle, *To the Pure* * * *, 249-255 (1928).) Obviously, given the appropriate circumstances, nearly anything can be sexually stimulating. If a person "reads a book when his sensuality is low," as Judge Curtis Bok puts it, "he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the printed page that have no business there." (*Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. R. 101, 137-38 (1949), aff'd 166 Pa. 120, 70 A. 2d 389 (1950).)

Appendix

Erotic stimulation, in any event, is not of itself the agent of anti-social behavior. If it were, the prohibitions affecting obscenity would have to be extended to include the wide variety of stimulating agents we have mentioned, and many more.

> "I think no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading obscene books has merely that consequence, Congress, it would seem, can constitutionally no more suppress such books than it can prevent the mailing of many other objects, such as perfumes, for example, which notoriously produce that result." (*Roth* v. *Goldman*, 172 F (2) 788, 792.)

Far from being anti-social, erotic stimulation is essential to the very existence of society. "Unless the human race is to vanish entirely, we can scarcely afford to regard the arousing of normal sexual desires as a social danger to be curbed at all costs." (Walter Gellhorn, *Individual Freedom and Governmental Restraints*, 59 (1956).)

One authority reports no examples whatever of sexual offenses stimulated by "obscene" matter. (Karpman, *The Sexual Offender and His Offenses*, 360 (1954).) It is a commonplace that at least the female half of the population is largely immune to stimulation of this kind.

> "* * * [A]s Kinsey makes clear, women are not particularly interested in certain kinds of sex behavior—such as exhibitionism, peeping, and circulating pornography—in which many males delight. The Indiana University researchers * * * explain this sex difference by pointing out that females are less aroused psychologically than are males." (Robert Veit Sherwin, "Female Sex Crimes," in *Sex Life of the American Woman and the Kinsey Report*, 177-8 (1954).)

Furthermore, it has often been observed by psychologists that the individuals most interested in printed material with erotic content are the ones *least* likely to engage in any overt act as a result of it. (Testimony of Dr. Albert Ellis in *United States* v. *Roth*, S.D.N.Y. C-148-9 at p. 365.) The most delinquent youths are least likely to be interested in any kind of reading; of the delinquent and emotionally disturbed children in a survey presented to the Boston Kefauver Hearings on Juvenile Delinquency, the great majority had already manifested their disturbance before the age at which they could read at all. Not erotic stimulation but its very opposite—the inability to be stimulated—is characteristically found in what society calls sexual deviants and purveyors of "obscenity." A study of virtually all of the sex offenders convicted in New Jersey between April, 1949 and June, 1950 revealed that, aside from those involved in statutory rape and incest, they tended to be sexually inhibited and repressed rather than overimpulsive or over-sexed. "All told, 54 per cent of those studied showed severe sexual inhibition; and high rates of inhibition were particularly found among those convicted of non-coital sex relations with a minor, exhibitory acts, and disseminating 'obscene' material." (Albert Ellis and Ralph Brancale, *The Psychology of Sex Offenders*, 93-5 (1956).)

Those who are most affected tend to be, not the delinquents, but the prudish and censorious individuals who typically initiate complaints against material they find "obscene." They, and not the delinquents, are the only persons who consistently respond to published "erotica" in such a manner as to indicate any cause-and-effect relationship:

"* * * [T]he local Comstock, who prowls the book stores and magazine stands searching for 'shocking passages' to point at in horror, alarm, and glee, finds exactly what he is looking for and would be disappointed if he did not * * * He is often an emotionally disturbed and intemperate person with a paranoid personality. His attention is focussed on smut, and since he looks for it, he finds it everywhere." (Lockhart and McClure, "Literature, The Law of Obscenity, and the Constitution," 38 *Minn. Law Rev.* 371-378 (1954).)

2. IRRATIONAL JUDICIAL ODDITIES EMPLOYED TO COMPENSATE FOR ABSENCE OF EVIDENCE OF CAUSAL RELATIONSHIP

The compulsion of man to try to explain or justify the occurrences of the world about him is his noblest characteristic and his gravest danger. In the absence of a method of inquiry which offers either a reasonable hypothesis or a scientifically tested cause and effect relationship resort is had to the process of rationalization. To secure acceptance a rationalization need meet no objective standards—the approbation of those forces in the community enjoying the power of suasion is sufficient. It is "judicial notice" at its worst.

It has therefore been normal and indeed inescapable for man, whether juror or judge, in the absence of knowledge showing a causal relationship between ideas and behaviour in the field of morals or sexual conventions, to evoke a rationalization as a substitute for constitutional standards. Since 1872 the judicial determination of obscenity has rested on a variety of conflicting unestablished subjective assumptions, including:

Appendix

1. Motive of the author. This is often invoked as an excuse for suppression or defense for freedom of his ideas. This obviously is a complete negation of any scrutiny of the effect on the reader; causal relationship is dispensed with. But assuming even that a given idea in print or picture can be shown to elicit anti-social behaviour, then surely an author with high motives can bring about the evil, and similarly an author with low motives, perhaps even intending to bring about such evil, can be ineffective.

2. Price. In many cases the price at which the book is sold is used as a test. By and large expensive books gain immunity thereby. The only validity of such testing factor lies in the presumption that the rich are incorruptible or are already corrupted, or that which is costly is therefore not tawdry. This is basically a cornerstone theory of an aristocratic society.

3. A greater measure of freedom for the daily press. A special and understandable sanctity of freedom for the daily and weekly press as distinguished from other printed formats seems to have been developed by our legislators and judges. Apparently it is assumed that books and magazines require the interposition of a censor between the author and the community, whereas the more readily available newspaper must be viewed under different standards. Perhaps the unwillingness to attack the newspaper is only an expression of fear on the part of the censorious that such an attack on a popular institution might lose to them the freedom to condemn other material.

4. Classics. In historic terms there is to be found an amusing conflict which leads to the grant of immunity from

obscenity laws to so called classics. No one has yet determined how long an author must be dead before his work becomes a classic. We would appear to have developed a reverence for classics to the point where their obscenities can travel through our culture with impunity. An idea back of this absurdity may be that a person reading a classic becomes enveloped in a distinguished mood that eliminates the impact of sexual material from any effect on the gonads.

5. Isolated passages. A recent trend indicates that any book must be read as a whole and cannot be suppressed because an isolated passage is deemed offensive. If, as the censor contends, the community must suffer some anti-social behaviour germinated by the specific episode, then what matters it, the content of the surrounding material? This supposedly modern approach by our courts is in reality only an application of the *de minimis* concept, useful in other areas of life, but of doubtful value in a situation where the effect upon the mind of the reader is the vital question.

6. Recently there has been a scurrying about the bookshops and newsstands throughout our nation directed primarily toward format, namely: paper bound books. This accent on a new format is typical of man's historic approach to communication; the fear of Guttenberg's press compared to the quill, the fear of radio compared to the printed word, the fear of movies compared to the spoken word, all give evidence that each new technique of dissemination invites attack on the technique and not essentially on the extension of the available audience.

7. Protection of our women. Only recently has there been a trace of impact of the new knowledge produced by scientists that women are not affected as are men by sexual titillation in print; they are not attracted by the so-called pornographic. For decades it has been theorized that material must be suppressed in order to protect our women. In the light of the scientific investigation that has shown that print or pictures are clearly without sexual glandular behaviour impact on women, the rationale must find its resting place along with the other fictions, legal and moral, that until this century guarded and disabled them.

8. Until recently in fetching for an excuse to condemn, no distinction was made between the impact on children of fiction as compared to non-fiction. The attack in the main has been on fiction. Investigation may well, however, recognize that realism, particularly in the daily press, has a very different impact than has anything in the realm of fiction or escape literature. Sexual perversion or deviation portrayed as an historical event may impress the mind of an adult, as well as the child, in quite a different fashion than the equivalent material appearing as fiction.

9. There are certain areas of relief provided in our enforcement of obscenity statutes to prevent the courts from being held up to ridicule by the upper reaches of our culture. One notes, for example, the existence of so-called obscenity contained in the reported law cases; the collections of "pornography" amassed by some of the more important libraries; and the practice of sending so-called obscenity material stopped from importation into the United States, to the Library of Congress for use by the learned.

10. Educational materials. Exceptions have been created in the name of education for manuals of sex instruction. Detailed explanations and specific illustrations contained in such works are permitted to circulate while similar descriptive passages translated to the medium of fiction subject the work to the danger of prosecution.

11. Competing forms. One of the curious anomalies in the area of censorship has developed in recent years with the advent of radio and television broadcasting. The book banned in one jurisdiction is read over radio facilities; the film which failed to obtain the approval of the censor is televised—both may be received by the people of the locality which has forbidden their introduction. Similarly, those states and cities which pre-censor all motion pictures may never have the opportunity to review the televised film.

12. Courts, Customs and Postal authorities at times dip into a mirage of subjective sexual connotations as tests of obscenity. Among other tidbits so used: High heels, nudity as distinguished from nakedness, black stockings and bras as exciters of males, four letter Anglo-Saxon words as distinguished from euphemisms of same implication, explicit as compared to implicit excitements, etchings as compared to paintings, verse versus prose, shift from stockings on women at bathing beaches to bare legs at a later date in a changing mores, brown breasts as compared to white breasts, *et cetera.* A recent confusion appears since "filthy" in the statute implies repulsion, a force, if any, antithetical to excitement.

13. Privacy. Some among us contend that each citizen has, as a part of the protection afforded him by the community, a right of privacy not to be deluged with noxious material. The individual, it is urged, should not be compelled to suffer this burden. While there is no evidence as to the extent of the burden, this taxation of the sensibilities of the community is really of little importance. We are, in these States, constitutionally dedicated to the creed that each citizen must exercise the right of selection secured to him by the First Amendment to choose from among all the thoughts of the mind of man freely communicated to him, to establish, without the aid of government, his own level of taste. Immunization from offensive products of the press must, if needed, be self-imposed.

* * *

A valuable list of books suppressed in our culture and elsewhere can be found in Banned Books by Anne Lyon Haight, 1955. The time and locale and circumstances of censorship gives ample evidence of the gravamen of this Appendix.

3. SOCIETAL SCARS CREATED BY LACK OF CONSTITUTIONAL STANDARDS FOR CONTROL OF SEXUAL STIMULI

Just as it may be shown that the effects of a given piece of reading matter are unlikely to be harmful, it can also be shown that the effect of censorship is not only harmful in itself but the source of other harms. Censorship removes to the courtroom questions of aesthetic and moral judgment which the healthy society, if it is to remain healthy, must settle for itself. Only through voluntary action—as Milton most eloquently argued in the *Areopagitica*—can either an individual or society exercise its moral muscles. A noted contemporary theologian has also commented on the inappropriateness of confusing the two areas:

> "Officers of the law must operate under statutes which in this matter are, or ought to be, narrowly drawn. On the other hand, voluntary reform, precisely because it is voluntary, may be based on the somewhat broader categories of common-sense judgment." (John Courtney Murray, S.J., "The Bad Arguments Intelligent Men Make," *America*, November 3, 1956.)

The effect of censorship by law is to provide an arena for combat between social forces whose antagonisms are notoriously irrelevant to the social problems, such as they are, presented by the circulation of "pornography." The most familiar of these is "the fight between the literati and the philistines," as two legal scholars have put it, for aesthetic jurisdiction over book publishing. (Lockhart and McClure, 38 *Minn. L. Rev.* 295, 328-9 (1954).) Both parties to the dispute tend to treat the legal history of

obscenity as a series of victories or defeats, located on a scale between liberality and license; and thus is further postponed any objective analysis and cure of whatever anti-social phenomena are involved.

It may also be said of censorship in matters pertaining to sex that it derives from those general social and cultural criteria that are frequently called, for lack of a better name, "Puritan." Even the proponents of censorship accept this label:

> "The ascendancy of Puritanism in England promoted a pious reserve in language as in conduct * * * The Victorian era was a time of literary restraint * * * It may be that the time has come for the pendulum to swing back again * * * a consummation devoutly to be wished." (Gathings Committee Report, p. 5.)

While this statement has the merit of recognizing that standards have changed, it fails to point out that historical perspective has increased our understanding of those earlier times. We now know that the Puritans were not so "puritan," and that the Victorians cultivated "pious reserve" more in theory than in practice. "Puritan" standards have indeed been in good part abandoned for the very reason that we have discovered them to have been largely a surface veneer and a source of hypocrisy. "Every censorship," as Harold Lasswell writes, "produces a technique of evasion as well as a technique of administration." (*Censorship*, 3 Encyc. Soc. Sci. 290, 294 (1930).) Censorship and hypocrisy thrive on one another.

One effect of sexual censorship is to intensify the technically "decent" but highly emotional concentration on sex in advertising and entertainment in forms that are comparatively morbid and unhealthful:

"Censorship, official and unofficial, lets pass into the social mainstream countless images and innuendoes that could only be identified—if they were to be identified—as perverse. Of the normal, the lustful thoughts and desires of one sex for the other, it faithfully removes whatever trace it can." (Larrabee, "The Cultural Context of Sex Censorship," 20 *L. & Contemp. Prob.* 685 (1955).)

And it enormously increases the concentration of public attention on violence. "There is no mundane substitute for sex except sadism," writes the author of a study of the relationship between the two. "You may search the indexes to Krafft-Ebing, Ellis, Hirschfeld, Guyon, or any dozen sex scientists, but you will find no other human activity that can replace sex completely * * *. It is no accident that the end of Restoration bawdry coincided precisely with the fullest flowering of literary sadism in England * * *. The elegant eighteenth-century litterateurs, Johnson and Pope, are famous equally for the sexual purity of their writing, the sadistic cruelty of their speech: Sex being forbidden, violence took its place." (G. Legman, *Love and Death*, 9, 10 (1949).)

This phenomenon can be found ubiquitously in American popular reading matter—for example in the works of Mickey Spillane, which have the largest printings of any novels published in America. ("As of June, 1954, 24,000,000 copies of Spillane's books had been published." Christopher La Farge, "Mickey Spillane and His Bloody Hammer," *The Saturday Review*, November 6, 1954, p. 11.) The combination of sex and sadism has frequently been observed, but it should also be noted that there is an imbalance between the two. "Sex, in these novels, is lush but abortive and unresolved. Sadism is explicit, fully re-

alized, minutely described." (Anon., "Dames and Death," *Harper's Magazine*, May, 1952.)

Ideally, the literary art and the public consciousness should lend equal weight to both love and death, to the act in which life begins and that in which it ends. The healthy mind will not become excessively preoccupied with either, but neither will it shun them. Deny one entirely, however, as sexual censorship aims to do, and the other is naturally increased in prominence and emotional magnetism. Our media of communication are therefore overabundant in violence—newspapers which prey on catastrophe, television programs and radio "soap operas" which prey on domestic misery, an entire division of book publishing which preys on murder.

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SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION OF GREENLEAF PUBLISHING COMPANY AND HMH PUBLISHING CO., INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Greenleaf Publishing Company and HMH Publishing Co., Inc. hereby move for leave to file the attached brief *amicus curiae* in No. 582, October Term, 1956, *Roth* v. *United States*. The Solicitor General has consented to the filing of this brief, but the petitioner has refused consent.

Greenleaf Publishing Company publishes and transmits through the mails a magazine entitled "Rogue

for Men". HMH Publishing Co., Inc. publishes and transmits through the mails a magazine entitled "Playboy". Both of these magazines are at present the subject of proceedings before the Post Office Department wherein it is contended that they are non-mailable matter because they are in violation of 18 U.S.C. § 1461.[1] Actions are also pending in the District Court for the District of Columbia,[2] to enjoin the Postmaster from denying the publishers second class mailing rights. Since it is this Section of the Penal Code under which Petitioner Roth was convicted and since this case presents to the Court questions concerning the validity and construction of that Section, Greenleaf Publishing Company and HMH Publishing Co., Inc. have a direct and substantial interest in this case.

It is submitted that the *amicus curiae* brief attached hereto would materially aid the Court in its disposition of the case and will present a point of view not found in any other brief. The brief stresses the practical problems confronting publishers, writers, artists or photographers who carry on businesses dependent on the mails and who must therefore try to predict, at the risk of criminal punishment, whether the material they wish to mail is obscene within the meaning of the statute.

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[1] In the Matter of HMH Publishing Company, Inc. for the Entry of "Playboy" Magazine as Second Class Mail Matter at Chicago, Ill., H.E. Docket No. 4/84; In the Matter of Petition by Greenleaf Publishing Co., Publishers of "Rogue for Men Magazine", for Order to Show Cause Why Application for Second Class Entry Should Not be Granted and for Hearing Before Denial of Application for Second Class Entry, H.E. Docket No. 4/202.

[2] *HMH Publishing Company, Inc.* v. *Summerfield*, C.A. No. 5041-55; *Greenleaf Publishing Co.* v. *Summerfield*, C.A. No. 3481-56.

The brief presents, in a manner which will not, we believe, be found elsewhere, a full analysis of the problem of vagueness raised by § 1461. The brief also sets forth considerations which render the statute invalid under the First Amendment, and evaluates, for the first time so far as we are aware, the use of the jury in obscenity cases.

The brief concludes with a section designed to suggest the minimum standard of precision which would be required to render a statute regulating obscenity constitutional.

It is believed that the points contained in this brief will not be adequately treated by the parties to this case or by the other amici, and that Greenleaf Publishing Company and HMH Publishing Co., Inc., because of their direct interest in the administration of § 1461 are in a particularly fortunate position to give the Court a practical view of the problems of § 1461 and to suggest considerations relevant to their solution.

For the reasons given above, it is respectfully urged that the present motion be granted.

Respectfully submitted.

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SAMUEL ROTH, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE FOR GREENLEAF PUBLISHING COMPANY AND HMH PUBLISHING CO., INC.

INTRODUCTORY STATEMENT

This brief is filed on behalf of two magazine publishers who use the mails in their businesses and who are involved in proceedings before the Post Office Department under § 1461 of Title 18, U.S.C.[1] Petitioner Roth was convicted under this provision. HMH Publishing Co., Inc. is engaged in publishing and distribut-

[1] In the Matter of HMH Publishing Company, Inc. for the Entry of "Playboy" Magazine as Second Class Mail Matter at Chicago, Ill., H.E. Docket No. 4/84; In the Matter of Petition by Greenleaf Publishing Co., Publishers of "Rogue for Men Magazine", for Order to Show Cause Why Application for Second Class Entry Should Not be Granted and for Hearing Before Denial of Application for Second Class Entry, H.E. Docket No. 4/202.

ing a monthly periodical entitled "Playboy." The magazine was first put on sale in December, 1953. The distribution of the March, 1957 issue exceeded 1,000,000 copies. Greenleaf Publishing Company publishes and distributes a monthly periodical entitled "Rogue for Men". The magazine was first put on sale in October, 1955 and its distribution in February, 1957 exceeded 300,000 copies. Both magazines rely upon the mails for a substantial part of their circulation.

Each of these magazines publishes articles on topics of current interest, short stories, and sketches, pictures and drawings of both a humorous and serious character. Some of the articles and stories are of conspicuous literary merit by widely known writers including Wolcott Gibbs, P. G. Wodehouse, Budd Schulberg, and Philip Wylie. All the stories and features are designed to be read with pleasure by the audience of adult male readers for whom the magazines are published. The emphasis in both magazines is upon articles, stories and drawings of a humorous nature.

The Post Office has sought to bar each magazine from second class mailing rights, which provide the only economically feasible method of distribution through the mails. Injunctions have been issued by the United States District Court for the District of Columbia restraining the enforcement of administrative orders issued by the Post Office designed to bar these magazines from access to the mails.[2] The pending proceedings, together with the omnipresent danger of future proceedings, raise serious and substantial

[2] *HMH Publishing Company, Inc.* v. *Summerfield*, C.A. No. 5041-55; *Greenleaf Publishing Co.* v. *Summerfield*, C.A. No. 3481-56.

problems for the publishers, who are exposed not only to a continual danger that the magazines will be suppressed, but also to the hazard that they, despite their serious efforts to publish magazines of acceptable taste and quality, will be convicted and imprisoned or fined by reason of their activities as publishers.

The dilemma created by § 1461 for a publisher genuinely anxious to comply with the law is graphically illustrated by the accompanying five photographs, all taken from the August, 1956 issue of "Rogue for Men." Three of these photographs (Plates 1, 4 and 5) have been designated obscene by the Post Office Department's Division of Mail Classification; two (Plates 2 and 3) have not been deemed objectionable. By what standard are three of these photographs obscene while two are not? We invite the Court to examine these photographs, because they define the problem before the Court more fully than a glossary of a thousand definitions. They illustrate more acutely than a host of judicial pronouncements the problem confronting a publisher as he seeks to avoid indictment for depositing "obscene" material in the mail. They are offered here simply as a vivid demonstration of the arbitrarily subjective and confusing standards current in the law of obscenity.

The practical, day-to-day problems which confront these publishers under this provision are not unique to them, however. The same issues must be faced by every writer, artist, photographer and publisher. Publishers of excellent reputation and serious purpose have been hailed into court and summoned before the Post Office under this provision. "Playboy" and "Rogue for Men" are not the only targets of this type of legislation. World famous classics have been singled out for suppression under this or similar stat-

utes. The statute affects the small and the great; it is a gauntlet which must be run by literary masterpieces as well as by throw-away monthly magazines.

In appraising this extraordinary legislation, it is important to bear in mind that the protection of the young and the vulnerable is not a relevant consideration. The rule regulating the discussion of sex has undergone subtle growth over the past century, culminating in this Court's decision this term in *Butler* v. *Michigan*, —— U.S. ——. What may have begun in Victorian England and with Anthony Comstock as a concern with the corruption of the young and vulnerable—a corruption supposed to translate overtly into juvenile delinquency—became in time a restriction affecting the entire population. Then, in *Butler* v. *Michigan*, this Court held that however genuine or important the concern with the reading habits of the young, it is a concern which is irrelevant to the regulation of matter intended for distribution to adults. Although much is unclear in the law of obscenity today, it is now clear that its effects are to be tested by the reactions not of the young and the vulnerable but of the normal adult population. In short, unless the material is deleterious in its impact on adults, it cannot constitutionally be barred from general circulation because of possible consequences to children. We think it clear that Congress or the states may constitutionally enact appropriate legislation to shield children against obscene matter. A statute specifically designed to apply to children may be deemed valid although it would not satisfy the requirements of the First Amendment or the due process clause when applied to adults. See *Prince* v. *Massachusetts*, 321 U.S. 158, 168-169.

Moreover, it should be noted that the law here is concerned with the impact on an audience that is in no sense captive. Anyone who does not wish to consume obscene materials surely has a ready avenue of protection: he can simply leave them alone. "If one does not wish to associate with such folks as Joyce describes, that is one's own choice", said Woolsey, J., in *United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182. The focusing of the law on the thoughts, not actions, of adults, not children, who are free, not captive, is the framework within which the constitutionality of § 1461 must be tested.

The courts have rarely seen fit to isolate and make explicit the various levels of evils against which obscenity regulation is aimed. While it has been customary to string together the inciting to antisocial sexual conduct, the arousing of lustful thoughts, and the offending of the community sense of decency, any one of these standing alone has been regarded as a sufficient predicate for the regulation. The result is that in the present nebulous state of the law, the arousing of sexual thoughts alone, with no predication whatsoever of action, is enough. The law not infrequently deals with states of mind, but the law of obscenity is unique in its concern with states of mind which do not accompany overt action.

In the large it is not difficult for a writer, artist, photographer or publisher to stay clear of § 1461. All he has to do is avoid any explicit treatment of human love and sexual affairs. This, however, is an extravagant price. Love, lust and sex are pervasive human experiences. They cannot be dealt with adequately

without the possibility that they may result in sexually stimulating or sexually arousing some people. Literature cannot stay clear of or deny what everyone knows and experiences; social science cannot fail to report or study sexual mores; depth psychology cannot discard hypotheses as to sexual fantasy or the profound impact of sexual drives; and art cannot avoid portrayals of the human body.

Moreover, there is a large, imposing and growing body of opinion that sex and love are fundamental motivating drives, that their suppression or repression is destructive to mental health, and that free, open and candid treatment of sexual matters is conducive to happiness and a stable society.

We believe that § 1461, as presently construed and applied in the courts and administrative agencies, is unconstitutional. We believe that the statute is so vague and indefinite that it is impossible for a publisher to determine what he may safely publish and what he may not. It is a statute so lacking in specificity and so subjective in its application that it cannot be administered except in an arbitrary and capricious way. Because of the vagueness of the statute, authors, artists, photographers and publishers are inhibited from the free creation of ideas which the First Amendment is designed to safeguard. There is pressure to delete, to soften, to avoid. A statute which embodies a standard so vague invites the most vicious form of anti-intellectualism; it encourages anti-cultural movements, and triggers all of the suppressive impulses which lie latent in the community. A vague statute in the domain of the First Amendment encourages conformity and superficiality. It invites

the most prurient and intolerant to impose their harsh, rigid, and limited conceptions of morality, art and literature upon the entire community. The notion of obscenity as presently administered under this Act can stultify artistic creation and impoverish the community.

ARGUMENT

I. SECTION 1461 IS UNCONSTITUTIONALLY VAGUE

A. Judicial Interpretation of the Term "Obscene" Has Supplied No Workable Standard for Administration of Section 1461

We recognize that the validity of obscenity statutes frequently has been considered by lower courts. But while this Court has on several occasions referred in passing to such statutes,[3] it has reached no conclusion as to whether the term "obscenity" renders a criminal statute unconstitutional. In a few cases the court has upheld convictions where the validity of the statute was not challenged,[4] and in *United States* v. *Alpers*, 338 U.S. 680, the material in question was conceded to be obscene. The Court was equally divided in *Doubleday & Co.* v. *New York*, 335 U.S. 848. The constitutionality of obscenity statutes is therefore an open question before this Court, and one of vital concern today.

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[3] See *Ex Parte Jackson*, 96 U.S. 727; *Swearingen* v. *United States*, 161 U.S. 446; *Dysart* v. *United States*, 272 U.S. 655; *Near* v. *Minnesota*, 283 U.S. 697, 716; *United States* v. *Limehouse*, 285 U.S. 424; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572; *Winters* v. *New York*, 333 U.S. 507, 519; *Beauharnais* v. *Illinois*, 343 U.S. 250, 266; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505-506.

[4] *Grimm* v. *United States*, 156 U.S. 604; *Rosen* v. *United States*, 161 U.S. 29; *Price* v. *United States*, 165 U.S. 311; *Dunlop* v. *United States*, 165 U.S. 486; *Bartell* v. *United States*, 227 U.S. 427.

Section 1461 offers no guidance to the meaning of the word "obscene".[5] Unlike the terms "sacrilegious" and "massed crime stories of bloodshed and lust" which this Court found unconstitutionally vague," the term "obscenity" comes to us with a judicial gloss written in almost a century of applications. But has this judicial gloss supplied a tolerable degree of meaning? It is an open secret that the answer is "no"; and that in this instance the gloss has left the censors in our society free to establish an unhealthy surveillance over our arts and letters. It is a gloss under which Erskine Caldwell's "God's Little Acre" is obscene in Massachusetts,[7] but not in New York,[8] or Pennsylvania;[9] it is a gloss under which "Strange Fruit" is obscene[10] in some jurisdictions but not in others. It is a gloss under which it is held that a distinguished literary critic, Edmund Wilson, has at the height of his maturity written an obscene novel.[11] There are some legal terms like "fraud" which appear

[5] Section 1461 refers in the alternative to "obscene, lewd, lascivious or filthy" pictures or writings. As shown below, these terms are ordinarily used with little discrimination and the word "obscene" is employed to cover all of them. See the jury charge of the District Court below (Record, p. 25).

[6] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507.

[7] *Attorney General* v. *Book Named God's Little Acre*, 326 Mass. 281, 93 N.E. 2d 819 (1950).

[8] *People* v. *Viking Press, Inc.*, 147 Misc. 813, 264 N.Y.S. 534 (City Mag. Ct. 1933).

[9] *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949).

[10] *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N.E. 2d 840 (1945).

[11] *Doubleday & Co.* v. *New York*, 297 N.Y. 687, 77 N.E. 2d 6 (1947), affirmed without opinion, 335 U.S. 848.

intolerably vague only to the uninitiated; obscenity, we submit, is the opposite. The more we know of it, the less we know about it.

Three generations of judges have not been able to escape definitions of "obscene" which are totally circular. It is defined by reference to the lewd, the lascivious, the impure, the filthy. But the courts end up by defining each of these words in terms of the others.

Some sixty years ago this Court offered its only definition to date: "that form of immorality which has relation to sexual impurity". *Swearingen* v. *United States*, 161 U.S. 446, 451. Many definitions have been given by lower courts. We refer to only a few:

> "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." L. Hand, J., in *United States* v. *Kennerley*, 209 Fed. 119, 121 (D.C. S.D.N.Y., 1913).
>
> "whether a publication taken as a whole has a libidinous effect." *United States* v. *One Book Entitled Ulysses by James Joyce*, 72 F. 2d 705, 707 (2d Cir., 1934).
>
> "whether it would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires." *United States* v. *Dennett*, 39 F. 2d 564, 568 (2d Cir. 1930).
>
> "indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions or to the excrement therefrom. * * *
>
> "Dirty word description of the sweet and sublime, especially of the mystery of sex and procreation, is the ultimate of obscenity." *Besig* v.

United States, 208 F. 2d 142, 145, 146 (9th Cir., 1953).

In sum, the term is so vague that it does not furnish a workable, rational standard for judicial administration. Settling on a single one of the many definitions of the word "obscene" would not solve this problem. For proof of this, we may examine the phrase "sexually impure thoughts" from the District Court's charge in this case. This definition was singled out by the court below and may be said to constitute the essence of the definition presently before this Court.

It will be noted at once that the arousing of mere sexual thoughts is not sufficient to constitute obscenity. Surely no sane man thinks socially dangerous the arousing of all sexual desires. See Judge Frank in *Roth v. Goldman*, 172 F. 2d 788, 792 (2d Cir. 1949), cert. denied 337 U.S. 938. Therefore, the key word in the definition is "impure".

"Impure" is not a term with special legal meaning. It is generally defined as unclean or adulterated, but, interestingly enough, one accepted definition is obscene.[12] Thus, we start with a definition which is tautological. What kind of inner thought or response does the law seek to prevent? Thoughts about sexual perversion? Extra-marital relationships? Changes in sex mores? If a man is shown a photograph of a bathing beauty, would it be impure for him to think (a) of kissing her; (b) of how she would look nude; (c) of intercourse with her, or (d) of marrying her? Does the thinker's own marital status or his moral standards affect the "purity" or "impurity" of such thoughts?

[12] Webster's New International Dictionary (2d ed., 1949).

The difficulties do not end here, assuming that the law's concern is with stimulus to the sexual thought of the average adult. How intense must the arousal of thought or desire be? Is the law to be read between the lines, as it were, saying that literal physical sexual excitement is the necessary response? And if this is what the law is aimed at, it does not save it as presently written, since this is not what the judge tells the jury.

Congress and the states may punish automobile stealing or embezzlement, but they may not do so by enacting statutes which simply prohibit "dishonest actions" without specifying what they are, any more than they may prohibit "vice" or make "virtue" mandatory. Likewise, subject to the First Amendment, Congress could punish, by clear and specific regulations, the mailing of pictures of wholly nude women, or articles giving detailed descriptions of sexual intercourse, if such things are found harmful to the nation. But can anyone be punished for violating the "present critical point in the compromise between candor and shame"[13] for using "dirty word[s]" to describe "the sweet and sublime",[14] for contravening the "intangible moral concepts" of "the present age",[15] or, as here, for stimulating "sexually impure thoughts"? No more, we submit, than people could be forced to obey "a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and

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[13] *United States* v. *Kennerley*, 209 Fed. 119, 121 (D.C.S.D.N.Y. 1913).

[14] *Besig* v. *United States*, 208 F. 2d 142, 146 (9th Cir. 1953).

[15] *Parmelee* v. *United States*, 113 F. 2d 729, 731-732 (D.C. Cir. 1940).

jury." *United States* v. *E. Cohen Grocery Co.*, 255 U.S. 81, 89.

B. The Ambiguity of Section 1461 Is Underscored by the Absence of Any Evidence That Writings or Pictures Have Any Harmful Effects

As we have shown, the statute purports to prohibit the stimulation of certain thoughts. But even definition by the courts of the particular thoughts which it is a criminal offense to arouse would not eliminate the ambiguity for the simple reason that there is an utter lack of evidence concerning the impact which writings and pictures have on the human mind.

Specialists in human behavior know precious little about what influences the human mind. To date there has been only one study that has attempted a complete assessment of the effects of books and magazines on human thinking. Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954). The author shows that the cause for later predispositions to sexual disturbances must be sought in early childhood, before there is any possibility of exposure to obscene literature (Jahoda, 19, 20); and that obscene literature has been found not an important stimulation or source of information to any group in the community (Jahoda, 26-27, 35-36).[16] She concludes that it is impossible to say with any accuracy what impact literature has on people's minds (Jahoda, 40).[17] Interestingly enough,

[16] Cf. the findings reported in Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73 (1938) that women are stimulated primarily by the opposite sex, and hardly at all by literature.

[17] For a summary by Dr. Jahoda of her own conclusions, see Judge Frank's opinion below, 237 F. 2d at 815-816.

Dr. Jahoda suggests there is some basis for believing that reading, far from stimulating people to action, serves rather as a substitute gratification of needs that might otherwise lead to antisocial conduct (Jahoda, 37-40).

These findings were confirmed by the evidence in this case. Petitioner presented three expert witnesses. The first, Dr. Albert Ellis, a psychologist, therapist and marriage counselor (Transcript of Testimony, 315-318), testified with reference to the acceptance in present day America of material dealing with sex. He said that much of our popular literature contains explicit references to sex, as does a great deal of popular advertising. In his opinion the material sent through the mail by petitioner could not be considered obscene by present day standards (Tr. 360, 375). The second witness, Dr. Morris Herman, was a psychiatrist (Tr. 391). He testified that while books, like many other things might stimulate sexual thoughts, literature had no important effect on actions and does not contribute to sexual abnormalities or juvenile delinquency (Tr. 407, 409-410, 419-423, 430). These conclusions were supported by Dr. Irving Lorge, a distinguished psychologist (Tr. 448), who testified that the effect of a book depends on what people bring to it, rather than what they get out of it, and that there was no relationship between juvenile delinquency and reading material (Tr. 465, 457-468, 475).

These findings support the teachings of ordinary experience. We all know how hard it is to predict what will arouse thoughts of sex; that nakedness is not necessarily as exciting as a woman fully clothed; that over-clinical descriptions may be repellant rather than stimulating; and that an infinite variety of sounds,

smells, inanimate objects and activities may find some connection with sex through the devious passageways of the human mind.[18]

C. The Resort to Literary Criteria Generates Even Greater Confusion

The problem of determining whether a particular picture or writing is obscene under Section 1461 is all the greater because the courts have felt compelled to act as literary critics.[19] In *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (D.C. S.D.N.Y., 1933), Judge Woolsey, in determining whether James Joyce's "Ulysses" was obscene, undertook an analysis of the work's literary merit. He found that it was not obscene because it was a "sincere and serious attempt to devise a new literary method for the observation and description of mankind". 5 F. Supp. at 185. This sincerity and artistic merit test was also applied by the Court of Appeals for the Second Circuit in affirming Judge Woolsey, 72 F. 2d 705. But the views of Judge Woolsey should be contrasted with the literary views of Judge Manton, who held, in a dissenting opinion, that "Ulysses" was obscene:

> ". . . The people need and deserve a moral standard; it should be a point of honor with men of letters to maintain it. Masterpieces have never been produced by men given to obscenity or lustful thoughts—men who have no Master. Reverence for good work is the foundation of literary character. A refusal to imitate obscenity or to load a book with it is an author's professional chastity." 72 F. 2d at 711.

[18] See Judge Frank's opinion below, 237 F. 2d at 817.

[19] See discussion in Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295, 343-348 (1954).

As Judge Frank pointed out below, it is not clear whether the presence of artistic merit nullifies or renders innocent an otherwise obscene passage, or whether prima facie obscene materials can be privileged by their overall context. But in any event, it is now reasonably clear, at least under Federal law, that artistic merit affects the verdict.[20]

But do literary and artistic standards provide a surer basis for discriminating between the good and the bad? However, necessary, and however admirable this concession in the law, it serves to make the law less, rather than more, clear. If these matters are relevant, criminal guilt may then turn on purely aesthetic considerations. Consider two equally candid discussions of sex. One may escape unscathed, because it is thought to have the requisite artistic merit; publication of another may be a felony. Witness the treatment accorded Henry Miller's "Tropic of Cancer". One of the world's most distinguished critics, George Orwell, himself summed up as a "virtuous man" by Lionel Trilling,[21] highly prized Miller's book:

> "From a mere account of the subject matter of 'Tropic of Cancer' most people would assume it to be no more than a bit of naughty-naughty left over from the '20's. Actually, nearly everyone who read it saw at once that it was nothing of the kind, but a very remarkable book."[22]

[20] The Courts have read an exemption for literary merit into § 1461, although that statute conspicuously lacks the proviso inserted in the Customs Act, 19 U.S.C. § 1305(a) authorizing the Secretary of the Treasury to exempt the "so-called classics or books of recognized and established literary or scientific merit" from the ban on importation of obscene matter.

[21] Preface, "Homage to Catalonia" (1950).

[22] Orwell, "Inside the Whale" in A Collection of Essays by George Orwell, p. 217 (1954).

Nearly everyone, that is, except the judges who had occasion to pass on it. Contrast with Orwell's seasoned, critical judgment, the outcry of the Ninth Circuit in *Besig* v. *United States*, 208 F. 2d 142, 145 (9th Cir., 1953):

> "Consistent with the general tenor of the books, even human excrement is dwelt upon in the dirtiest words available. The author conducts the reader through sex orgies and perversions of the sex organs, and always in the debased language of the bawdy house. Nothing has the grace of purity or goodness. These words of the language of smut, and the disgraceful scenes, are so heavily larded throughout the books that those portions which are deemed to be of literary merit do not lift the reader's mind clear of their sticky slime. And it is safe to say that the 'literary merit' of the books carries the reader deeper into it. For this reason, The Tropics are far more dangerous than 'Confessions of a Prostitute' which was the subject of our opinion in Burstein v. United States, 9 Cir., 1949, 178 F. 2d 665."

In the case of "Tropic of Cancer", therefore, although conceding "the great weight of opinion evidence as to the quality of Mr. Miller's writings", the Court employed literary merit, not to save the book but to condemn it totally. Indeed, many thoughtful observers would agree with the Ninth Circuit that a work of superior artistic merit should have a more profound impact than an inferior book or painting. Thus, a work may be condemned in the Second Circuit because it lacks sincerity and artistic merit, and condemned in the Ninth Circuit precisely because it possesses these attributes.

D. The Evil Consequences of a Vague Statute Are Greater in the Area Protected by the First Amendment

We need only add that the ordinarily evil effect of loosely drawn criminal statutes is all the greater where such statutes trench on the area protected by the First Amendment. This Court has held that the statutes so vague and indefinite as to restrain persons in the fair exercise of their right to freedom of expression are unconstitutional. *Stromberg* v. *California*, 283 U.S. 359, 369. In *Herndon* v. *Lowry*, 301 U.S. 242, 264, the Court again struck down a statute for this reason, saying:

> "No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

And this Court applied this very principle to the question of magazines concerned with bloodshed and lust in *Winters* v. *New York*, 333 U.S. 507.

In a very real sense, the existence of § 1461 in its present form acts as a deterrent to the exercise of freedom of expression. Publishers are deterred, not only by actual danger of criminal punishment, but also by threats of colorable prosecutions, fear of expensive litigation, and an unwillingness to run the risks of any vague and indefinite statute. We submit that the present statute is unconstitutional because it requires writers and artists, at the risk of severe criminal penalties, to make predictions and judgments in the fields of psychology and literary criticism which no person skilled in those professions would hazard. Prudence dictates that any thing questionable be suppressed, for

publishers are businessmen, not crusaders for constitutional principles.' So long as the present statute remains in force, it will exercise a restraint on expression extending far beyond the area where Congress might legitimately act.[23] So long will the prurient and puritanical dictate the level of our arts and letters.

The burden of this legislation falls upon the community at large. Sex is a legitimate topic for free discussion in a mature society. Doubtless, there are some people who would prefer that there be no discussion of such emotions and that reticence be observed. But surely the emotional preferences of one segment of society cannot be fastened upon the entire community.

II. SECTION 1461 IS INVALID UNDER THE FIRST AMENDMENT

Section 1461 restricts the dissemination of literary and artistic ideas. It does so, as we have shown, in the most inclusive and vaguest of terms and without any evident relationship to an evil which Congress has

[23] A leading novelist and critic, E. M. Forster, has pointed out:

"that even the writer whose record is hitherto unblemished is uncertain what may or may not be judged obscene and hesitates in fear and suspicion. What he is about to write may seem to him perfectly innocent—it may be essential to his book; yet he has to ask himself what will the police magistrate say: and not only what will the police magistrate say, but what will the printer say and what will the publisher say? For both printer and publisher will be trying uneasily and anxiously to anticipate the verdict of the police magistrate and will naturally bring pressure to bear upon the writer to put them beyond reach of the law. He will be asked to weaken, to soften, to omit.' Such hesitation and suspense are fatal to freedom of mind and freedom of mind is essential to good literature." The Nineteenth Century and After, Vol. DCXXVI, April 1929, quoted by St. John-Stevas in *Obscenity and the Law*, p. 193 (1956).

power to prevent. The section is, therefore, in violation of the First Amendment.

Even if the statute were constitutionally definite it would still be invalid under the First Amendment for the reason that it invades the areas of thought and artistic creation which are insulated by the Amendment from any governmental regulation.

We do not know whether the Court believes that the test under Section 1461 is (i) the effect which so-called "obscene" matter supposedly has on the thoughts and emotions of an adult, non-captive audience, or (ii) whether the test is the effect on the conduct of such persons. If the former, we think the statute invalid for the reason that it seeks to control the area of thought sheltered by the First Amendment. If the test is whether the matter stimulates overt acts specified and defined, the clear and present danger test should apply. Even if we postulate a statute which precisely defines the illegal acts, and assuming that the clear and present danger test is applicable, we think the statute would still be of doubtful constitutionality because of the utter impossibility of demonstrating any connection between the obscene matter and the prohibited conduct. In any event, as a minimum, the clear and present danger limitation or the "gravity" test delineated by the Court in *United States* v. *Dennis*, 341 U.S. 494, should be applied in obscenity cases.

First Amendment protection of ideas in this field cannot be denied on the ground that the obscene libel was an historic component of English common law in 1791, for two reasons. First, there was virtually no English law of obscenity at that time. Alpert, Judicial

Censorship of Obscene Literature, 52 Harv. L. Rev. 40 (1938); Lockhart & McClure, *op. cit. supra;* St. John-Stevas, The Law of Obscenity (1956). The first genuine obscenity decision in England was not rendered until 1868 and came only after the enactment of The Obscene Publications Act, 20-21 Vict. c. 83 (1857). *Queen* v. *Hicklin*, L.R. 3 Q.B. 360 (1868). Second, this Court has repudiated the notion that the First Amendment adopted the English law of free speech. See Justice Holmes dissenting in *Abrams* v. *United States*, 250 U.S. 616, 630; Chafee, Free Speech in the United States (1941) Ch. 1. There is therefore no apparent reason for holding that while the regulation of picketing, or contempt by publication, or incitement to violence, or even revolution must be measured against clear and present danger criteria, the regulation of literature candidly treating sexual topics need not be.

One final point. There is authority that the law of obscenity reaches one other category of evil—thematic obscenity. *People* v. *Friede*, 133 Misc. 611, 233 N.Y.S. 565. (City Mag. Ct., 1929); see *One, Inc.* v. *Olesen*, 25 LW 2415 (9th Cir. 1957). In the *Friede* case, the objection to Radclyffe Hall's "Well of Loneliness" went not to its sexual imagery or its taste, for the court found the book had artistic merit and restraint; it went only to the theme—a plea for the tolerant endurance by society of its homosexuals. Insofar as the law of obscenity reaches material on this premise, surely its reach is to be tested by customary First Amendment notions. For here we are quite literally involved in regulation of the market place of ideas.

Faced with the insuperable problems created by the First and Fifth Amendments, courts have sought refuge in the jury. In *United States* v. *Kennerley*, 209 Fed. 119 (D.C. S.D.N.Y., 1913), Judge Learned Hand first described the function of the jury in fixing the critical point in the "compromise between candor and shame". A quarter of a century later, Judge Hand had occasion to return once more to the role of the jury in obscenity cases in *United States* v. *Levine*, 83 F. 2d 156, 157 (2d Cir., 1936):

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. U. S., supra, 161 U.S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors. We mentioned some of these in United States v. One Book Entitled Ulysses, supra, 72 F. (2d) 705; the work must be taken as a whole, its merits weighed against its defects (Konda v. U. S., [C.C.A. 7]

166 F. 91, 22 L.R.A. [N.S.] 304); if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc, like the standard of care."

In the end, the only meaning of obscenity is not a meaning the courts have been able to give it, but whatever meaning and whatever standard the jury sees fit to legislate each time it is given a case. However admirable the jury, as an institution for polling community sentiment on some troublesome issues, we do not believe that in this area a jury determination of community sentiments is consistent with the requirements of the First Amendment or the due process clause.

We do not think the jury can be delegated the power to punish authors, artists and publishers for an undefined offense. If Congress cannot legislate in this area because of constitutional limitations, surely the jury cannot do so. The use of the jury in these cases presents problems of a most fundamental nature. The jury is traditionally supposed to reflect the views of the average man. However, the function of literature and art is not merely to reflect community opinion, but rather to change public opinion, furnish leadership and provide insight into the unknown. The right to experiment is the lifeblood of art. See Forster, Two Cheers for Democracy, 97-98 (1951). We cannot entrust the determination of the permissible

bounds of free expression to a societal instrument which is designed to reflect the view of the average man. Freedom of expression means the right to express the unusual, the unconventional, the unacceptable and even the distasteful. When the works of Sigmund Freud were first published fifty years ago, they were deemed filthy and shocking by many people. See Jones, The Life and Work of Sigmund Freud, Vol. 2, ch. 4 (1955). No thoughtful person can doubt that the world would have sustained immeasurable loss if these works had been suppressed. Yet surely that would have been their fate if the average conscience of the community had been consulted. We submit that the dilemma created by the First and Fifth Amendments cannot be resolved by relegating these issues to the jury.

CONCLUSION

It is our position that Section 1461 is unconstitutional under both the First and Fifth Amendments as a vague and indefinite statute which invades the protected area of free expression.

We believe that the Section's repugnancy to the Constitution is all the more apparent when it is viewed as applied in this case. In the District Court, the prosecution offered no material evidence other than the matter alleged to be obscene. This was turned over to the jury with the following instructions by the trial court (R. 25-26):

> "The words 'obscene', 'lewd' and 'lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the

minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts. The test is not whether it would arouse sexual desires or sexual impure thoughts [sic] in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, that it tends to arouse a feeling of disgust and revulsion.

"The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The court's charge that a "tend[ency] to stir sexual desire or sexually impure thoughts" and a "tend[ency] to arouse a feeling of disgust and revulsion" were sufficient for conviction violates the clear and present danger requirement of the First Amendment. The court's charge that a criminal offense was committed if feelings "of disgust and revulsion" were aroused by the publication offends the due process clause. It ignores the fact that this case involves a

non-captive, adult audience, free to read or to avoid the published materials.

These instructions, typical of those given in obscenity cases, emphasize the constitutional difficulties apparent on the face of the statute. They confuse many different definitions of obscenity, creating even greater uncertainty than the statute itself. They invite the jury to employ its own subjective standards in reaching a verdict, and to attempt to find, without any form of guidance, the average conscience of the community. They stress the need to protect the morals of the community but give no weight to the fundamental values to the community in freedom of expression.

If § 1461 is to be brought closer to the requirements of the Constitution, the issue to be determined must be carefully narrowed and subjected to exacting safeguards. At the very minimum, the Court should expose the supposed evil in this area to the same searching scrutiny under the First Amendment to which it subjects other federal and state legislation in the area of free speech. The power to decide that books shall not circulate cannot constitutionally be entrusted to the arbitrary whim of police officials, Post Office censors, administrative agencies, or even a judge.

If the question is to be committed to the jury, the jury must be made aware that the First Amendment recognizes the right freely to communicate ideas through speech and press, that our democratic society depends for its very survival upon the preservation of this freedom and that we will tolerate interference with this freedom only in rare cases where we conceive that its exercise will produce a greater evil than

its curtailment.[24] In such an atmosphere, the jury should then be instructed that they may convict only if persuaded beyond a reasonable doubt by a clear evidentiary showing that there is a clear and present danger that an illegal act will be induced by the material in question. As Judge Bok stated in *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949), aff'd. sub nom. *Commonwealth* v. *Feigenbaum*, 166 Pa. 120, 70 A. 2d 389 (1950); the prosecution must establish

> "that a crime or misdemeanor has been committed or is about to be committed, as the perceptible result of the publication and distribution of the writing in question . . ."

Whether or not § 1461 as so limited would be consistent with the First and Fifth Amendments, we believe it manifest that it cannot stand as applied here.

Section 1461 is not only unconstitutional, but as applied here it would stifle an enduring part of the human spirit. Louis Untermeyer observed recently that " . . . the world's favorite humor has been a playful expression of primitive sensuality", and that "The satisfactions of the body, from food to sex, are responsible for some of the wisest and wittiest as well as some of the most rollicking and ribald writing in literature." * * * [W]hen the world seems not only

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[24] The charges of English courts in obscenity cases present a striking contrast to the charges in many cases in this country. See charge of Mr. Justice Stable in *R.* v. *Martin Secker & Warburg* (1954) W.L.R. 1138:

> "Your verdict will have a great bearing upon where the line is drawn between liberty and that freedom to read and think as the spirit moves us, on the one hand and on the other a license that is an affront to the society of which each of us is a member."

too much with him but against him, he [man] frequently thumbs his nose at it all and escapes by way of his irrepressible lust for life, his saving gift of gaiety, his very animal spirits." Untermeyer, A Treasury of Ribaldry, Forward (1956).

For the reasons given, the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

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v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE FOR GREENLEAF PUBLISHING COMPANY AND HMH PUBLISHING CO., INC.

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INTRODUCTORY STATEMENT

This brief is filed on behalf of two magazine publishers who use the mails in their businesses and who are involved in proceedings before the Post Office Department under § 1461 of Title 18, U.S.C.[1] Petitioner Roth was convicted under this provision. HMH Publishing Co., Inc. is engaged in publishing and distribut-

[1] In the Matter of HMH Publishing Company, Inc. for the Entry of "Playboy" Magazine as Second Class Mail Matter at Chicago, Ill., H.E. Docket No. 4/84; In the Matter of Petition by Greenleaf Publishing Co., Publishers of "Rogue for Men Magazine", for Order to Show Cause Why Application for Second Class Entry Should Not be Granted and for Hearing Before Denial of Application for Second Class Entry, H.E. Docket No. 4/202.

ing a monthly periodical entitled "Playboy." The magazine was first put on sale in December, 1953. The distribution of the March, 1957 issue exceeded 1,000,000 copies. Greenleaf Publishing Company publishes and distributes a monthly periodical entitled "Rogue for Men". The magazine was first put on sale in October, 1955 and its distribution in February, 1957 exceeded 300,000 copies. Both magazines rely upon the mails for a substantial part of their circulation.

Each of these magazines publishes articles on topics of current interest, short stories, and sketches, pictures and drawings of both a humorous and serious character. Some of the articles and stories are of conspicuous literary merit by widely known writers including Wolcott Gibbs, P. G. Wodehouse, Budd Schulberg, and Philip Wylie. All the stories and features are designed to be read with pleasure by the audience of adult male readers for whom the magazines are published. The emphasis in both magazines is upon articles, stories and drawings of a humorous nature.

The Post Office has sought to bar each magazine from second class mailing rights, which provide the only economically feasible method of distribution through the mails. Injunctions have been issued by the United States District Court for the District of Columbia restraining the enforcement of administrative orders issued by the Post Office designed to bar these magazines from access to the mails.[2] The pending proceedings, together with the omnipresent danger of future proceedings, raise serious and substantial

[2] *HMH Publishing Company, Inc. v. Summerfield*, C.A. No. 3041-55; *Greenleaf Publishing Co. v. Summerfield*, C.A. No. 3481-56.

problems for the publishers, who are exposed not only to a continual danger that the magazines will be suppressed, but also to the hazard that they, despite their serious efforts to publish magazines of acceptable taste and quality, will be convicted and imprisoned or fined by reason of their activities as publishers.

The practical, day-to-day problems which confront these publishers under this provision are not unique to them, however. The same issues must be faced by every writer, artist, photographer and publisher. Publishers of excellent reputation and serious purpose have been hailed into court and summoned before the Post Office under this provision. "Playboy" and "Rogue for Men" are not only the only targets of this type of legislation. World famous classics have been singled out for suppression under this or similar stat-

utes. The statute affects the small and the great; it is a gauntlet which must be run by literary masterpieces as well as by throw-away monthly magazines.

In appraising this extraordinary legislation, it is important to bear in mind that the protection of the young and the vulnerable is not a relevant consideration. The rule regulating the discussion of sex has undergone subtle growth over the past century, culminating in this Court's decision this term in *Butler* v. *Michigan*, —— U.S. ——. What may have begun in Victorian England and with Anthony Comstock as a concern with the corruption of the young and vulnerable—a corruption supposed to translate overtly into juvenile delinquency—became in time a restriction affecting the entire population. Then, in *Butler* v. *Michigan*, this Court held that however genuine or important the concern with the reading habits of the young, it is a concern which is irrelevant to the regulation of matter intended for distribution to adults. Although much is unclear in the law of obscenity today, it is now clear that its effects are to be tested by the reactions not of the young and the vulnerable but of the normal adult population. In short, unless the material is deleterious in its impact on adults, it cannot constitutionally be barred from general circulation because of possible consequences to children. We think it clear that Congress or the states may constitutionally enact appropriate legislation to shield children against obscene matter. A statute specifically designed to apply to children may be deemed valid although it would not satisfy the requirements of the First Amendment or the due process clause when applied to adults. *See Prince* v. *Massachusetts*, 321 U.S. 158, 168-169.

Moreover, it should be noted that the law here is concerned with the impact on an audience that is in no sense captive. Anyone who does not wish to consume obscene materials surely has a ready avenue of protection: he can simply leave them alone. "If one does not wish to associate with such folks as Joyce describes, that is one's own choice", said Woolsey, J., in *United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182. The focusing of the law on the thoughts, not actions, of adults, not children, who are free, not captive, is the framework within which the constitutionality of § 1461 must be tested.

The courts have rarely seen fit to isolate and make explicit the various levels of evils against which obscenity regulation is aimed. While it has been customary to string together the inciting to antisocial sexual conduct, the arousing of lustful thoughts, and the offending of the community sense of decency, any one of these standing alone has been regarded as a sufficient predicate for the regulation. The result is that in the present nebulous state of the law, the arousing of sexual thoughts alone, with no predication whatsoever of action, is enough. The law not infrequently deals with states of mind, but the law of obscenity is unique in its concern with states of mind which do not accompany overt action.

In the large it is not difficult for a writer, artist, photographer or publisher to stay clear of § 1461. All he has to do is avoid any explicit treatment of human love and sexual affairs. This, however, is an extravagant price. Love, lust and sex are pervasive human experiences. They cannot be dealt with adequately

without the possibility that they may result in sexually stimulating or sexually arousing some people. Literature cannot stay clear of or deny what everyone knows and experiences; social science cannot fail to report or study sexual mores; depth psychology cannot discard hypotheses as to sexual fantasy or the profound impact of sexual drives; and art cannot avoid portrayals of the human body.

Moreover, there is a large, imposing and growing body of opinion that sex and love are fundamental motivating drives, that their suppression or repression is destructive to mental health, and that free, open and candid treatment of sexual matters is conducive to happiness and a stable society.

We believe that § 1461, as presently construed and applied in the courts and administrative agencies, is unconstitutional. We believe that the statute is so vague and indefinite that it is impossible for a publisher to determine what he may safely publish and what he may not. It is a statute so lacking in specificity and so subjective in its application that it cannot be administered except in an arbitrary and capricious way. Because of the vagueness of the statute, authors, artists, photographers and publishers are inhibited from the free creation of ideas which the First Amendment is designed to safeguard. There is pressure to delete, to soften, to avoid. A statute which embodies a standard so vague invites the most vicious form of anti-intellectualism; it encourages anti-cultural movements, and triggers all of the suppressive impulses which lie latent in the community. A vague statute in the domain of the First Amendment encourages conformity and superficiality. It invites

the most prurient and intolerant to impose their harsh, rigid, and limited conceptions of morality, art and literature upon the entire community. The notion of obscenity as presently administered under this Act can stultify artistic creation and impoverish the community.

ARGUMENT

I. SECTION 1461 IS UNCONSTITUTIONALLY VAGUE

A. Judicial Interpretation of the Term "Obscene" Has Supplied No Workable Standard for Administration of Section 1461

We recognize that the validity of obscenity statutes frequently has been considered by lower courts. But while this Court has on several occasions referred in passing to such statutes,[3] it has reached no conclusion as to whether the term "obscenity" renders a criminal statute unconstitutional. In a few cases the court has upheld convictions where the validity of the statute was not challenged,[4] and in *United States* v. *Alpers*, 338 U.S. 680, the material in question was conceded to be obscene. The Court was equally divided in *Doubleday & Co.* v. *New York*, 335 U.S. 848. The constitutionality of obscenity statutes is therefore an open question before this Court, and one of vital concern today.

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[3] See *Ex Parte Jackson*, 96 U.S. 727; *Swearingen* v. *United States*, 161 U.S. 446; *Dysart* v. *United States*, 272 U.S. 655; *Near* v. *Minnesota*, 283 U.S. 697, 716; *United States* v. *Limehouse*, 285 U.S. 424; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572; *Winters* v. *New York*, 333 U.S. 507, 519; *Beauharnais* v. *Illinois*, 343 U.S. 250, 266; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505-506.

[4] *Grimm* v. *United States*, 156 U.S. 604; *Rosen* v. *United States*, 161 U.S. 29; *Price* v. *United States*, 165 U.S. 311; *Dunlop* v. *United States*, 165 U.S. 486; *Bartels* v. *United States*, 235 U.S. 427.

Section 1461 offers no guidance to the meaning of the word "obscene".[5] Unlike the terms "sacrilegious" and "massed crime stories of bloodshed and lust" which this Court found unconstitutionally vague,[6] the term "obscenity" comes to us with a judicial gloss written in almost a century of applications. But has this judicial gloss supplied a tolerable degree of meaning? It is an open secret that the answer is "no" and that in this instance the gloss has left the censors in our society free to establish an unhealthy surveillance over our arts and letters. It is a gloss under which Erskine Caldwell's "God's Little Acre" is obscene in Massachusetts,[7] but not in New York,[8] or Pennsylvania;[9] it is a gloss under which "Strange Fruit" is obscene[10] in some jurisdictions but not in others. It is a gloss under which it is held that a distinguished literary critic, Edmund Wilson, has at the height of his maturity written an obscene novel.[11] There are some legal terms like "fraud" which appear

[5] Section 1461 refers in the alternative to "obscene, lewd, lascivious or filthy" pictures or writings. As shown below, these terms are ordinarily used with little discrimination and the word "obscene" is employed to cover all of them. See the jury charge of the District Court below (Record, p. 25).

[6] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507.

[7] *Attorney General* v. *Book Named God's Little Acre*, 326 Mass. 281, 93 N.E. 2d 819 (1950).

[8] *People* v. *Viking Press, Inc.*, 147 Misc. 813, 264 N.Y.S. 534 (City Mag. Ct. 1933).

[9] *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949).

[10] *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N.E. 2d 840 (1945).

[11] *Doubleday & Co.* v. *New York*, 297 N.Y. 687, 77 N.E. 2d 6 (1947), affirmed without opinion, 335 U.S. 848.

intolerably vague only to the uninitiated; obscenity, we submit, is the opposite. The more we know of it, the less we know about it.

Three generations of judges have not been able to escape definitions of "obscene" which are totally circular. It is defined by reference to the lewd, the lascivious, the impure, the filthy. But the courts end up by defining each of these words in terms of the others.

Some sixty years ago this Court offered its only definition to date: "that form of immorality which has relation to sexual impurity". *Swearingen* v. *United States*, 161 U.S. 446, 451. Many definitions have been given by lower courts. We refer to only a few:

> "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." L. Hand, J., in *United States* v. *Kennerley*, 209 Fed. 119, 121 (D.C. S.D.N.Y., 1913).
>
> "whether a publication taken as a whole has a libidinous effect." *United States* v. *One Book Entitled Ulysses by James Joyce*, 72 F. 2d 705, 707 (2d Cir., 1934).
>
> "whether it would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires." *United States* v. *Dennett*, 39 F. 2d 564, 568 (2d Cir. 1930).
>
> "indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions or to the excrement therefrom. * * *
>
> "Dirty word description of the sweet and sublime, especially of the mystery of sex and procreation, is the ultimate of obscenity." *Besig* v.

United States, 208 F. 2d 142, 145, 146 (9th Cir., 1953).

In sum, the term is so vague that it does not furnish a workable, rational standard for judicial administration. Settling on a single one of the many definitions of the word "obscene" would not solve this problem. For proof of this, we may examine the phrase "sexually impure thoughts" from the District Court's charge in this case. This definition was singled out by the court below and may be said to constitute the essence of the definition presently before this Court.

It will be noted at once that the arousing of mere sexual thoughts is not sufficient to constitute obscenity. Surely no sane man thinks socially dangerous the arousing of all sexual desires. See Judge Frank in *Roth v. Goldman*, 172 F. 2d 788, 792 (2d Cir. 1949), cert. denied 337 U.S. 938. Therefore, the key word in the definition is "impure".

"Impure" is not a term with special legal meaning. It is generally defined as unclean or adulterated, but, interestingly enough, one accepted definition is obscene.[12] Thus, we start with a definition which is tautological. What kind of inner thought or response does the law seek to prevent? Thoughts about sexual perversion? Extra-marital relationships? Changes in sex mores? If a man is shown a photograph of a bathing beauty, would it be impure for him to think (a) of kissing her; (b) of how she would look nude; (c) of intercourse with her, or (d) of marrying her? Does the thinker's own marital status or his moral standards affect the "purity" or "impurity" of such thoughts?

[12] Webster's New International Dictionary (2d ed., 1949).

The difficulties do not end here, assuming that the law's concern is with stimulus to the sexual thought of the average adult. How intense must the arousal of thought or desire be? Is the law to be read between the lines, as it were, saying that literal physical sexual excitement is the necessary response? And if this is what the law is aimed at, it does not save it as presently written, since this is not what the judge tells the jury.

Congress and the states may punish automobile stealing or embezzlement, but they may not do so by enacting statutes which simply prohibit "dishonest actions" without specifying what they are, any more than they may prohibit "vice" or make "virtue" mandatory. Likewise, subject to the First Amendment, Congress could punish, by clear and specific regulations, the mailing of pictures of wholly nude women, or articles giving detailed descriptions of sexual intercourse, if such things are found harmful to the nation. But can anyone be punished for violating the "present critical point in the compromise between candor and shame"[13] for using "dirty word[s]" to describe "the sweet and sublime",[14] for contravening the "intangible moral concepts" of "the present age",[15] or, as here, for stimulating "sexually impure thoughts"? No more, we submit, than people could be forced to obey "a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and

[13] *United States v. Kennerley*, 209 Fed. 119, 121 (D.C.S.D.N.Y. 1913).

[14] *Roth v. United States*, 205 F. 2d 142, 146 (9th Cir. 1953).

[15] *Palmelee v. United States*, 113 F. 2d 729, 731-732 (D.C. Cir. 1940).

jury." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89.

B. The Ambiguity of Section 1461 Is Underscored by the Absence of Any Evidence That Writings or Pictures Have Any Harmful Effects

As we have shown, the statute purports to prohibit the stimulation of certain thoughts. But even definition by the courts of the particular thoughts which it is a criminal offense to arouse would not eliminate the ambiguity for the simple reason that there is an utter lack of evidence concerning the impact which writings and pictures have on the human mind.

Specialists in human behavior know precious little about what influences the human mind. To date there has been only one study that has attempted a complete assessment of the effects of books and magazines on human thinking. Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954). The author shows that the cause for later predispositions to sexual disturbances must be sought in early childhood, before there is any possibility of exposure to obscene literature (Jahoda, 19, 20); and that obscene literature has been found not an important stimulation or source of information to any group in the community (Jahoda, 26-27, 35-36).[16] She concludes that it is impossible to say with any accuracy what impact literature has on people's minds (Jahoda, 40).[17] Interestingly enough,

[16] Cf. the findings reported in Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73 (1938) that women are stimulated primarily by the opposite sex, and hardly at all by literature.

[17] For a summary by Dr. Jahoda of her own conclusions, see Judge Frank's opinion below, 237 F. 2d at 815-816.

Dr. Jahoda suggests there is some basis for believing that reading, far from stimulating people to action, serves rather as a substitute gratification of needs that might otherwise lead to antisocial conduct (Jahoda, 37-40).

These findings were confirmed by the evidence in this case. Petitioner presented three expert witnesses. The first, Dr. Albert Ellis, a psychologist, therapist and marriage counselor (Transcript of Testimony, 315-318), testified with reference to the acceptance in present day America of material dealing with sex. He said that much of our popular literature contains explicit references to sex, as does a great deal of popular advertising. In his opinion the material sent through the mail by petitioner could not be considered obscene by present day standards (Tr. 360, 375). The second witness, Dr. Morris Herman, was a psychiatrist (Tr. 394). He testified that while books, like many other things might stimulate sexual thoughts, literature had no important effect on actions and does not contribute to sexual abnormalities or juvenile delinquency (Tr. 407, 409-410, 419-423, 430). These conclusions were supported by Dr. Irving Lorge, a distinguished psychologist (Tr. 448), who testified that the effect of a book depends on what people bring to it, rather than what they get out of it, and that there was no relationship between juvenile delinquency and reading material (Tr. 465, 457-468, 475).

These findings support the teachings of ordinary experience. We all know how hard it is to predict what will arouse thoughts of sex; that nakedness is not necessarily as exciting as a woman fully clothed; that over-clinical descriptions may be repellant rather than stimulating; and that an infinite variety of sounds,

smells, inanimate objects and activities may find some connection with sex through the devious passageways of the human mind.[18]

C. The Resort to Literary Criteria Generates Even Greater Confusion

The problem of determining whether a particular picture or writing is obscene under Section 1461 is all the greater because the courts have felt compelled to act as literary critics.[19] In *United States* v. *One Book Called Ulysses*, 5 F. Supp. 182 (D.C. S.D.N.Y., 1933), Judge Woolsey, in determining whether James Joyce's "Ulysses" was obscene, undertook an analysis of the work's literary merit. He found that it was not obscene because it was a "sincere and serious attempt to devise a new literary method for the observation and description of mankind". 5 F. Supp. at 185. This sincerity and artistic merit test was also applied by the Court of Appeals for the Second Circuit in affirming Judge Woolsey, 72 F. 2d 705. But the views of Judge Woolsey should be contrasted with the literary views of Judge Manton, who held, in a dissenting opinion, that "Ulysses" was obscene:

> ". . . The people need and deserve a moral standard; it should be a point of honor with men of letters to maintain it. Masterpieces have never been produced by men given to obscenity or lustful thoughts—men who have no Master. Reverence for good work is the foundation of literary character. A refusal to imitate obscenity or to load a book with it is an author's professional chastity." 72 F. 2d at 711.

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[18] See Judge Frank's opinion below, 237 F. 2d at 817.

[19] See discussion in Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295, 343-348 (1954).

As Judge Frank pointed out below, it is not clear whether the presence of artistic merit nullifies or renders innocent an otherwise obscene passage, or whether prima facie obscene materials can be privileged by their overall context. But in any event, it is now reasonably clear, at least under Federal law, that artistic merit affects the verdict.[20]

But do literary and artistic standards provide a surer basis for discriminating between the good and the bad? However, necessary, and however admirable this concession in the law, it serves to make the law less, rather than more, clear. If these matters are relevant, criminal guilt may then turn on purely aesthetic considerations. Consider two equally candid discussions of sex. One may escape unscathed, because it is thought to have the requisite artistic merit; publication of another may be a felony. Witness the treatment accorded Henry Miller's "Tropic of Cancer". One of the world's most distinguished critics, George Orwell, himself summed up as a "virtuous man" by Lionel Trilling,[21] highly prized Miller's book:

> "From a mere account of the subject matter of 'Tropic of Cancer' most people would assume it to be no more than a bit of naughty-naughty left over from the '20's. Actually, nearly everyone who read it saw at once that it was nothing of the kind, but a very remarkable book."[22]

[20] The Courts have read an exemption for literary merit into § 1461, although that statute conspicuously lacks the proviso inserted in the Customs Act, 19 U.S.C. § 1305(a) authorizing the Secretary of the Treasury to exempt the "so-called classics or books of recognized and established literary or scientific merit" from the ban on importation of obscene matter.

[21] Preface, "Homage to Catalonia" (1950).

[22] Orwell, "Inside the Whale" in A Collection of Essays by George Orwell, p. 217 (1954).

Nearly everyone, that is, except the judges who had occasion to pass on it. Contrast with Orwell's seasoned critical judgment, the outcry of the Ninth Circuit in *Besig* v. *United States*, 208 F. 2d 142, 145 (9th Cir., 1953):

> "Consistent with the general tenor of the books, even human excrement is dwelt upon in the dirtiest words available. The author conducts the reader through sex orgies and perversions of the sex organs, and always in the debased language of the bawdy house. Nothing has the grace of purity or goodness. These words of the language of smut, and the disgraceful scenes, are so heavily larded throughout the books that those portions which are deemed to be of literary merit do not lift the reader's mind clear of their sticky slime. And it is safe to say that the 'literary merit' of the books carries the reader deeper into it. For this reason, The Tropics are far more dangerous than 'Confessions of a Prostitute' which was the subject of our opinion in Burstein v. United States, 9 Cir., 1949, 178 F. 2d 665."

In the case of "Tropic of Cancer", therefore, although conceding "the great weight of opinion evidence as to the quality of Mr. Miller's writings", the Court employed literary merit, not to save the book but to condemn it totally. Indeed, many thoughtful observers would agree with the Ninth Circuit that a work of superior artistic merit should have a more profound impact than an inferior book or painting. Thus, a work may be condemned in the Second Circuit because it lacks sincerity and artistic merit, and condemned in the Ninth Circuit precisely because it possesses these attributes.

D. The Evil Consequences of a Vague Statute Are Greater in the Area Protected by the First Amendment

We need only add that the ordinarily evil effect of loosely drawn criminal statutes is all the greater where such statutes trench on the area protected by the First Amendment. This Court has held that the statutes so vague and indefinite as to restrain persons in the fair exercise of their right to freedom of expression are unconstitutional. *Stromberg* v. *California*, 283 U.S. 359, 369. In *Herndon* v. *Lowry*, 301 U.S. 242, 264, the Court again struck down a statute for this reason, saying:

> "No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

And this Court applied this very principle to the question of magazines concerned with bloodshed and lust in *Winters* v. *New York*, 333 U.S. 507.

In a very real sense, the existence of § 1461 in its present form acts as a deterrent to the exercise of freedom of expression. Publishers are deterred, not only by actual danger of criminal punishment, but also by threats of colorable prosecutions, fear of expensive litigation, and an unwillingness to run the risks of any vague and indefinite statute. We submit that the present statute is unconstitutional because it requires writers and artists, at the risk of severe criminal penalties, to make predictions and judgments in the fields of psychology and literary criticism which no person skilled in those professions would hazard. Prudence dictates that any thing questionable be suppressed, for

publishers are businessmen, not crusaders for constitutional principles. So long as the present statute remains in force, it will exercise a restraint on expression extending far beyond the area where Congress might legitimately act.[23] So long will the prurient and puritanical dictate the level of our arts and letters.

The burden of this legislation falls upon the community at large. Sex is a legitimate topic for free discussion in a mature society. Doubtless, there are some people who would prefer that there be no discussion of such emotions and that reticence be observed. But surely the emotional preferences of one segment of society cannot be fastened upon the entire community.

II. SECTION 1461 IS INVALID UNDER THE FIRST AMENDMENT

Section 1461 restricts the dissemination of literary and artistic ideas. It does so, as we have shown, in the most inclusive and vaguest of terms and without any evident relationship to an evil which Congress has

[23] A leading novelist and critic, E. M. Forster, has pointed out:

> "that even the writer whose record is hitherto unblemished is uncertain what may or may not be judged obscene and hesitates in fear and suspicion. What he is about to write may seem to him perfectly innocent; it may be essential to his book; yet he has to ask himself what will the police magistrate say; and not only what will the police magistrate say, but what will the printer say and what will the publisher say? For both printer and publisher will be trying uneasily and anxiously to anticipate the verdict of the police magistrate and will naturally bring pressure to bear upon the writer to put them beyond reach of the law. He will be asked to weaken, to soften, to omit. Such hesitation and suspense are fatal to freedom of mind and freedom of mind is essential to good literature." The Nineteenth Century and After, Vol. DCXXVI, April 1929, quoted by St. John-Stevas in *Obscenity and the Law*, p. 193 (1956).

power to prevent. The section is, therefore, in violation of the First Amendment.

Even if the statute were constitutionally definite it would still be invalid under the First Amendment for the reason that it invades the areas of thought and artistic creation which are insulated by the Amendment from any governmental regulation.

We do not know whether the Court believes that the test under Section 1461 is (i) the effect which so-called "obscene" matter supposedly has on the thoughts and emotions of an adult, non-captive audience, or (ii) whether the test is the effect on the conduct of such persons. If the former, we think the statute invalid for the reason that it seeks to control the area of thought sheltered by the First Amendment. If the test is whether the matter stimulates overt acts, specified and defined, the clear and present danger test should apply. Even if we postulate a statute which precisely defines the illegal acts, and assuming that the clear and present danger test is applicable, we think the statute would still be of doubtful constitutionality because of the utter impossibility of demonstrating any connection between the obscene matter and the prohibited conduct. In any event, as a minimum, the clear and present danger limitation or the "gravity" test delineated by the Court in *United States* v. *Dennis*, 341 U.S. 494, should be applied in obscenity cases.

First Amendment protection of ideas in this field cannot be denied on the ground that the obscene libel was an historic component of English common law in 1791, for two reasons. First, there was virtually no English law of obscenity at that time. Alpert, Judicial

Censorship of Obscene Literature, 52 Harv. L. Rev. 40 (1938); Lockhart & McClure, *op. cit. supra*; St. John-Stevas, The Law of Obscenity (1956). The first genuine obscenity decision in England was not rendered until 1868 and came only after the enactment of The Obscene Publications Act, 20-21 Vict. c. 83 (1857). *Queen* v. *Hicklin*, L.R. 3 Q.B. 360 (1868). Second, this Court has repudiated the notion that the First Amendment adopted the English law of free speech. See Justice Holmes dissenting in *Abrams* v. *United States*, 250 U.S. 616, 630; Chafee, Free Speech in the United States (1941) Ch. 1. There is therefore no apparent reason for holding that while the regulation of picketing, or contempt by publication, or incitement to violence, or even revolution must be measured against clear and present danger criteria, the regulation of literature candidly treating sexual topics need not be.

One final point. There is authority that the law of obscenity reaches one other category of evil—thematic obscenity. *People* v. *Friede*, 133 Misc. 611, 233 N.Y.S. 565, (City Mag. Ct., 1929); see *One, Inc.* v. *Olesen*, 25 LW 2415 (9th Cir. 1957). In the *Friede* case, the objection to Radclyffe Hall's "Well of Loneliness" went not to its sexual imagery or its taste, for the court found the book had artistic merit and restraint; it went only to the theme—a plea for the tolerant endurance by society of its homosexuals. Insofar as the law of obscenity reaches material on this premise, surely its reach is to be tested by customary First Amendment notions. For here we are quite literally involved in regulation of the market place of ideas.

Faced with the insuperable problems created by the First and Fifth Amendments, courts have sought refuge in the jury. In *United States* v. *Kennerley*, 209 Fed. 119 (D.C. S.D.N.Y., 1913), Judge Learned Hand first described the function of the jury in fixing the critical point in the "compromise between candor and shame". A quarter of a century later, Judge Hand had occasion to return once more to the role of the jury in obscenity cases in *United States* v. *Levine*, 83 F. 2d 156, 157 (2d Cir., 1936):

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. U. S., supra, 161 U.S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors. We mentioned some of these in United States v. One Book Entitled Ulysses, supra, 72 F. (2d) 705; the work must be taken as a whole, its merits weighed against its defects (Konda v. U. S., [C.C.A. 7]

> 166 F. 91, 22 L.R.A. [N.S.] 304); if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc, like the standard of care."

In the end, the only meaning of obscenity is not a meaning the courts have been able to give it, but whatever meaning and whatever standard the jury sees fit to legislate each time it is given a case. However admirable the jury, as an institution for polling community sentiment on some troublesome issues, we do not believe that in this area a jury determination of community sentiments is consistent with the requirements of the First Amendment or the due process clause.

We do not think the jury can be delegated the power to punish authors, artists and publishers for an undefined offense. If Congress cannot legislate in this area because of constitutional limitations, surely the jury cannot do so. The use of the jury in these cases presents problems of a most fundamental nature. The jury is traditionally supposed to reflect the views of the average man. However, the function of literature and art is not merely to reflect community opinion, but rather to change public opinion, furnish leadership and provide insight into the unknown. The right to experiment is the lifeblood of art. See Forster, Two Cheers for Democracy, 97-98 (1951). We cannot entrust the determination of the permissible

bounds of free expression to a societal instrument which is designed to reflect the view of the average man. Freedom of expression means the right to express the unusual, the unconventional, the unacceptable and even the distasteful. When the works of Sigmund Freud were first published fifty years ago, they were deemed filthy and shocking by many people. See Jones, The Life and Work of Sigmund Freud, Vol. 2, ch. 4 (1955). No thoughtful person can doubt that the world would have sustained immeasurable loss if these works had been suppressed. Yet surely that would have been their fate if the average conscience of the community had been consulted. We submit that the dilemma created by the First and Fifth Amendments cannot be resolved by relegating these issues to the jury.

CONCLUSION

It is our position that Section 1461 is unconstitutional under both the First and Fifth Amendments as a vague and indefinite statute which invades the protected area of free expression.

We believe that the Section's repugnancy to the Constitution is all the more apparent when it is viewed as applied in this case. In the District Court, the prosecution offered no material evidence other than the matter alleged to be obscene. This was turned over to the jury with the following instructions by the trial court (R. 25-26):

> "The words 'obscene', 'lewd' and 'lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the

minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts. The test is not whether it would arouse sexual desires or sexual impure thoughts [sic] in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, that it tends to arouse a feeling of disgust and revulsion.

"The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The court's charge that a "tend[ency] to stir sexual desire or sexually impure thoughts" and a "tend[ency] to arouse a feeling of disgust and revulsion" were sufficient for conviction violates the clear and present danger requirement of the First Amendment. The court's charge that a criminal offense was committed if feelings "of disgust and revulsion" were aroused by the publication offends the due process clause. It ignores the fact that this case involves a

non-captive, adult audience, free to read or to avoid the published materials.

These instructions, typical of those given in obscenity cases, emphasize the constitutional difficulties apparent on the face of the statute. They confuse many different definitions of obscenity, creating even greater uncertainty than the statute itself. They invite the jury to employ its own subjective standards in reaching a verdict; and to attempt to find, without any form of guidance, the average conscience of the community. They stress the need to protect the morals of the community but give no weight to the fundamental values to the community in freedom of expression.

If § 1461 is to be brought closer to the requirements of the Constitution, the issue to be determined must be carefully narrowed and subjected to exacting safeguards. At the very minimum, the Court should expose the supposed evil in this area to the same searching scrutiny under the First Amendment to which it subjects other federal and state legislation in the area of free speech. The power to decide that books shall not circulate cannot constitutionally be entrusted to the arbitrary whim of police officials, Post Office censors, administrative agencies, or even a judge.

If the question is to be committed to the jury, the jury must be made aware that the First Amendment recognizes the right freely to communicate ideas through speech and press, that our democratic society depends for its very survival upon the preservation of this freedom and that we will tolerate interference with this freedom only in rare cases where we conceive that its exercise will produce a greater evil than

its curtailment.[21] In such an atmosphere, the jury should then be instructed that they may convict only if persuaded beyond a reasonable doubt by a clear evidentiary showing that there is a clear and present danger that an illegal act will be induced by the material in question. As Judge Bok stated in *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949), aff'd. sub nom. *Commonwealth* v. *Feigenbaum*, 166 Pa. 120, 70 A. 2d 389 (1950); the prosecution must establish

> "that a crime or misdemeanor has been committed or is about to be committed, as the perceptible result of the publication and distribution of the writing in question . . ."

Whether or not § 1461, as so limited would be consistent with the First and Fifth Amendments, we believe it manifest that it cannot stand as applied here.

Section 1461 is not only unconstitutional, but as applied here it would stifle an enduring part of the human spirit. Louis Untermeyer observed recently that " . . . the world's favorite humor has been a playful expression of primitive sensuality", and that "The satisfactions of the body, from food to sex, are responsible for some of the wisest and wittiest as well as some of the most rollicking and ribald writing in literature." * * * [W]hile the world seems not only

[21] The charges of English courts in obscenity cases present a striking contrast to the charges in many cases in this country. See charge of Mr. Justice Stable in *R.* v. *Martin Secker & Warburg* (1954) W.L.R. 1138:

> "Your verdict will have a great bearing upon where the line is drawn between liberty and that freedom to read and think as the spirit moves us, on the one hand and on the other a license that is an affront to the society of which each of us is a member."

too much with him but against him, he [man] frequently thumbs his nose at it all and escapes by way of his irrepressible lust for life, his saving gift of gaiety, his very animal spirits." Untermeyer, A Treasury of Ribaldry, Foreword (1956).

For the reasons given, the judgment below should be reversed.

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October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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Preliminary Statement

This brief is submitted with the written consent of the parties herein.

The American Civil Liberties Union is an organization whose membership is distributed throughout the United States. It is concerned with the protection of the civil liberties of all persons, whether or not it agrees with their views. Of especial concern to it is the protection of the freedoms guaranteed by the First Amendment.

The policy of the American Civil Liberties Union is that the constitutional guarantees of free speech and press apply to all expression, and there is no special category of obscenity or pornography to which different constitutional tests apply. To be constitutional, an obscenity statute at least must meet the requirement of definiteness; and also require that, before any material can be held to be obscene, it must be established beyond a reasonable doubt that the material represents a clear and present danger of normally inducing behavior which validly has been made criminal by statute.

This case involves a novel question dealing with freedom of the press, which requires resolution. This Court has not heretofore squarely decided the application of the First Amendment to prosecutions with relation to literature that is asserted to be obscene. In this case, at least two important questions are presented: (1) whether the law can be applied in such manner that a person may be apprised with definiteness of the wrong that may subject him to punishment; (2) may a person who publishes or distributes a book be convicted though evidence is lacking that such a book will probably cause anti-social conduct?

Statement of the Case

The defendant was charged with depositing for mailing certain obscene matter in violation of the Federal statute, Title 18 U. S. C. Sect. 2 and 1461 and for conspiracy under 62 Stat. 701, Section 371. He was convicted on four counts, and received a sentence of five years and a fine. His conviction was affirmed by the Court of Appeals for the Sec-

ond Circuit. On the defendant's challenge of constitutionality, that Court was reluctant to pass upon that claim, in the belief that this Court should do so. Judge Frank wrote a strong separate concurring opinion, which to all practical effect is a dissenting opinion and a suggestion that this Court hold the law unconstitutional.

Statute Involved

The statute involved is 18 U. S. C. Sect. 1461, 62 Stat. 768 and reads as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, papers, letter, writing, print, or other publication of an indecedent character; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *
>
> Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance, * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposi-

tion thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

POINT I

Absent evidence that the publications will probably and immediately cause anti-social conduct, the conviction violates the First Amendment.

The First Amendment occupies a preferred position in constitutional protection.

Therefore, a person may print what he chooses, and the burden—a most weighty burden is on the prosecution to show justification for suppression. The justification urged here is that the publications are "obscene" (when the expression "obscene" is used in this brief it refers also to the other characterizing adjectives grouped together in the statute).

The danger that is inherent in punishment for utterances is as applicable to this case as in any other. History has shown how publications that were deemed obscene by courts were subsequently accepted without question. See, Haight, Banned Books (2 Ed. 1955).

This Court has had no occasion previously to pass upon the validity of "obscenity" laws, whether Federal or State, except that in *Doubleday & Co., Inc.* v. *New York*, 335 U. S. 848, this Court, by an evenly divided court, affirmed the conviction of the publisher of "Memoirs of Hecate County". In affirming, this Court thus gave recog-

nition, that the Constitution affords protection to all writings or at least, raises constitutional issues for resolution. See also, *Butler* v. *Michigan,* 25 U. S. Law Week, 4165, where the decision did not treat or dispose of the obscenity question. See also Lockhart & McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minnesota Law Review, 352.

In *Dennis* v. *United States,* 341 U. S. 494, this Court reformulated the clear and present danger rule, which since *Schenck* v. *United States,* 249 U. S. 47, had governed permissible punishment for speech. The *Dennis* case revised the rule so that it only need be shown that the evil sought to be avoided or eliminated would "probably" flow from the speech. Said the Court:

> "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significance. More we cannot expect from words."

This Court, in any event, recognized however, that the evil had to be serious and grave

Justice Douglas said these words for the dissenters:

> "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech.' The Constitution provides no exception.

> This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson 'that it is time enough for the rightful purpose of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.' The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action."

See also, *Herndon* v. *Lowry,* 301 U. S. 242, 258; *Craig* v. *Harney,* 331 U. S. 367, where it was also emphasized that free speech is the heart of a democracy (p. 383).

The freedom to publish is not only for the exposition of ideas. It also covers entertainment of any kind,—even literature of no special value. *Winters* v. *New York,* 333 U. S. 507.

In reaching these conclusions, the Court is not bound by legislative judgment of the evil, but must make an

independent examination to ascertain whether the publication has the probable effect of producing overt social harm. *Pennekamp* v. *Florida*, 328 U. S. 331; *Craig* v. *Harney*, 331 U. S. 367; *Schneider* v. *State*, 308 U. S. 147, 161.

Along with the doctrine of the *Dennis* case must be considered the right of the public to read which was recently articulated in *Butler* v. *Michigan, supra.*

Once the burden is on the prosecution to show a right to punish for speech, it would follow that it has the burden of establishing that evil would probably flow from the books in question.

What are the evils that are usually asserted to be produced by books that are obscene? When we state this we do not minimize that they may produce shock, disgust or even offensiveness to tastes and high standards.

The asserted evils are:

1. The books would produce depraved sex attitudes or would arouse to lust.
2. The books would be productive of "juvenile delinquency".

Nowhere does it appear that the prosecution has carried its burden of bringing forth evidence that the books would, with any degree of probability cause these evils.

On the contrary, the available evidence is to the contrary. Recently a study was made to learn of the effects of reading on behavior. Distinction in such a study must be made, of course, between *harmful* social effects and normal behavior. For instance, assuming it can be shown

that the reading of a book will probably cause sex urges. That in itself could not be reasonably construed to be a social evil, for the sex impulse is a normal conduct.

In *Kingsley Books Inc.* v. *Brown*, No. 107, now before this Court for argument, Judge Fuld observed in footnote 3 that scientific studies are being made concerning the impact of writings, including the obscene, on the behavior of men, women and children, citing Jahoda and Staff of Research Center for Human Relations, New York University (1954), The Impact of Literature. A Pyschological Discussion of Some Assumptions in the Censorship Debate. Judge Frank took the occasion in this case to make further inquiry of the writer of that study. The summary of that study by the author, as given to Judge Frank is as follows:

> "Persons who argue for increased censorship of printed matter often operate on the assumption that reading about sexual matters or about violence and brutality leads to anti-social actions, particularly to juvenile delinquency. An examination of the pertinent psychological literature has led to the following conclusions:
>
> 1. There exists no research evidence either to prove or to disprove this assumption definitively.
>
> 2. In the absence of scientific proof two lines of psychological approach to the examination of the assumption are possible: (a) a review of what is known on the causes of juvenile delinquency; and (b) review of what is known about the effect of literature on the mind of the reader.
>
> 3. In the vast research literature on the causes of juvenile delinquency there is no evidence to jus-

tify the assumption that reading about sexual matters or about violence leads to delinquent acts. Experts on juvenile delinquency agree that it has no single cause. Most of them regard early childhood events, which precede the reading age, as a necessary condition for later delinquency. At a later age, the nature of personal relations is assumed to have much greater power in determining a delinquent career than the vicarious experiences provided by reading matter. Juvenile delinquents as a group read less, and less easily, than non-delinquents. Individual instances are reported in which so-called 'good' books allegedly influenced a delinquent in the manner in which 'bad' books are assumed to influence him.

Where childhood experiences and subsequent events have combined to make delinquency psychologically likely, reading could have one of two effects: it could serve a trigger function releasing the criminal act or it could provide for a substitute outlet of aggression in fantasy, dispensing with the need for criminal action. There is no empirical evidence in either direction.

4. With regard to the impact of literature on the mind of the reader, it must be pointed out that there is a vast overlap in content between all media of mass communication. The daily press, television, radio, movies, books and comics all present their share of so-called 'bad' material, some with great realism as reports of actual events, some in clearly fictionalized form. It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them. Some evidence suggests that the particular communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose

themselves to everything that is offered, but only to what agrees with their inclinations.

Children, who have often not yet crystallized their preferences and have more unspecific curiosity than many adults, are therefore perhaps more open to accidental influences from literature. This may present a danger to youngsters who are insecure or maladjusted who find in reading (of 'bad' books as well as of 'good' books) an escape from reality which they do not dare face. Needs which are not met in the real world are gratified in a fantasy world. It is likely, though not fully demonstrated, that excessive reading of comic books will intensify in children those qualities which drove them to the comic book world to begin with: an ability to face the world, apathy, a belief that the individual is hopelessly impotent and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world.

It should be noted that insofar as causal sequence is implied, insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to these potential effects. Unfortunately, perhaps, the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales might do much the same."

That summary emphasizes that the assumption that reading about sex or about violence leads to anti-social action and, particularly to juvenile delinquency is without support of evidence.

Other studies are to the same effect. Alpert, Judicial Censorship of Obscene Literature, 52 Harvard Law Rev., 40, 72, shows that knowledge about matters sexual come

usually from sources other than books. Another study found that those who get involved in anti-social behavior are not the kind of persons who are inclined toward reading. Lockhart & McClure, *Obscenity In the Courts*, 20 Law & Contemporary Problems, 587, where it is said on page 596:

> "(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth —the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The

many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

There are many variables that make for sex stimulation, not least of them being the sensual level of the reader himself. Judge Bok made this point in *Commonwealth* v. *Gordon*, 66 Pa. D & C, 101, where he made these observations (p. 137):

"If he reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book or another? When, where, how, and why are questions that cannot be answered clearly in this field. The professional answer that is suggested is the one general compromise—that the appetite of sex is old, universal, and unpredictable, and that the best we can do to keep it within reasonable bounds is to be our brother's keeper and censor, because we never know when his sensuality may be high. This does not satisfy me, for in a field

where even reasonable precision is utterly impossible, I trust people more than I do the law."

So, also, as Judge Frank and others have pointed out, that erotic stimulation may come from any symbol or sensation that may be associated with the observer, such as perfume, a handkerchief, and countless others. In this, the fault does not lie with the handkerchief or perfume, but with the person who accepts them as stimuli. The fault—if any there be—is with the low sensual threshhold of the person.

Furthermore, this sensual receptiveness, among other factors, can be attributed to the society we live in. There is a great preoccupation with sex. Lippman, *A Preface to Morals,* 285, 300; Kinsey, et al.,—*Sexual Behavior in the Male;* Kinsey, et al., *Sexual Behavior in the Human Female;* G. R. Scott, *Into Whose Hands,* p. 5; T. Schroeder, *Obscene Literature and Constitutional Law,* p. 275.

This atmosphere of sex is pervasive particularly where large commercial organizations hawk their wares through advertisements supposedly alluring. Clothing merchants, bathing suit and brassiere manufacturers as examples among many do all they can to emphasize the role of sex.

This pervasiveness results in mores, whose genesis cannot be attributed to any single person or to any isolated factor. It is there.

The prevalence of these mores makes for "readiness", as psychologists call it,—makes for the capacity of a person to react to a stimulus. It doesn't follow therefore, that the book, the supposed stimulus,—is the necessarily competent producing cause.

POINT II

The statute violates due process under the Fifth Amendment because it is vague.

In examining the scope of the First Amendment it should not be overlooked that the First Amendment did not adopt the British ideas of restraints on speech. On the contrary, it was adopted to do away with the British practices. *Robertson* v. *Baldwin*, 165 U. S. 275, 28; *Leach* v. *Carlisle*, 258 U. S. 138, 141; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248; *Bridges* v. *California*, 314 U. S. 252, 264. Therefore, common law cases are not controlling.

It has been said that "obscenity" is a well understood word through long usage. Yet when one studies and examines the constructions put on the word by the courts, one enters a vast hall of confusion. For the sake of brevity, reference is made to independent studies: Alpert, *supra;* Lockhart and McClure, Literature, The Law of Obscenity and the Constitution, pp. 324-350.

Even if one were to take the definition, charged by the trial court in this case, from *United States* v. *Levine*, 83 Fed. 2d 156, the arousal of sexual thoughts and desires on an average adult person, one is not free from obscurity.

To test what this means, we must enter the practical world where laws are in action.

First, take the case of the lawyer who is asked whether a book may be published and distributed. How would he know? His personal subjective views may be a concatenation of all factors that make for his personality. He cannot jump out of his skin to be objective. His next resort

would be the decisions of the courts. They would merely repeat the rubric found in the *Levine* case. But how to apply it is his task. There is no standard to guide him. He can advise his client what larceny is or what arson is. But so far as "obscenity" is concerned, he must tell his client to either forego publishing (which is a deterrent to publication) or else to take his risk that he might be convicted by the predilections of a judge, or be acquitted on another's predilections.

This results in *ad hoc* legislation of an *ex post facto* nature and which the Constitution forbids. This Court in *Lanzetta* v. *New Jersey*, 306 U. S. 451, held that a person cannot be convicted under an obscure statute that is sought to be construed for the first time in that case. In other words, a person is not obliged to be a guinea pig to afford clarification of a law. The penal law must be so clear in the first instance, that a person may know what is the permissible area of his conduct, without having to take risks. In *Winters* v. *New York*, 333 U. S. 507, that same problem arose as to whether due process permits a statute to operate in such way that a person must become a guinea pig as a sacrifice for the legislature's omissions. This Court set that case down for reargument of that very question. That point was decided however on what was said in *Lanzetta*.

A second illustration that occurs, is a practical and serious one prevalent today because of nation-wide "drives" against publications claimed to be obscene (Lockhart & McClure, *supra*, 302). Let us take the case of the small candy and cigar store that also sells newspapers and books. Here is a class of self-employer who works from early

morning to midnight for the purpose of ekeing out a moderate livelihood.

He receives his books usually from the same distributor of newspapers or even perhaps of his cigars and candies. One day he is suddenly confronted by the police who find a book, on display for sale, and which is claimed to be obscene. He is arrested, handcuffed and marched off with indignity before his astonished neighbors. He is held in bail, put to the expense of retaining counsel, placed in jeopardy and subjected to the torments of a trial. Had he even read the book he would not know whether it is condemned by statute. Nor could anyone tell him in advance, not even by a declaratory judgment. *Dreiser* v. *Lane Co.*, 183 App. Div. 773.

The shifting applications of the term "obscenity" have many lessons in the past. They reveal how uncertain the law is and how unreliable it is as a guide to a citizen who must obey or go to jail.

Southey's "Wat Tyler" or Byron's "Cain" or Byron's "Don Juan" or Shelley's "Queen Mab", were condemned respectively in *Southey* v. *Sherwood*, 2 Mer. 435; *Murray* v. *Benbow*, Jac. 474 n; *Lord Byron* v. *Dugdale*, 1 L. J. Ch. 239, Moxon's Case, 2 Townsend's Mod. St. Tr. 356. These were the incidents that brought forth these words from Judge Augustus N. Hand in *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705:

> "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the work of Byron and Southey, and the findings by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense

> are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

This language was subsequently approved in *Parmelee* v. *United States,* 113 F. (2d) 729, 737, 738; *Hannegan* v. *Esquire,* 327 U. S. 146, 157, 158.

These "foolish judgments" may be repeated over and over again unless some standard of practical application be adopted. If one cannot be found, then it might be better as Judge Bok observed, to trust people rather than the law. At least, the small candy storekeeper or bookseller will find safety in the law rather than peril.

These "foolish judgments" result from the inability of the judges to apply any objective tests. One judge will find a book free from legal condemnation. Another will convict on the same book. Why? Judges themselves are the victims, so to speak, of a law that is so vague and flexible that it means all things to all men. If a judge of the stature of Lord Eldon could be "foolish", then others can meet the same misfortune.

A reply to this might be a resort to the observation that "disorderly conduct" is an elastic term. But conduct is not as amorphous as thought or speech. That is the difference between the speech with a probable breach of the peace,—"fighting words,—face to face" as in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, and ordinary speech as *De Jonge* v. *Oregon,* 299 U. S. 353.

In *Holmby Productions* v. *Vaughan,* 350 U. S. 870, this Court had before it a Kansas statute that permitted censorship of motion pictures that were "cruel, obscene, inde-

cent, or immoral, or such as tend to debase or corrupt morals". The Supreme Court of Kansas rested its decision on the ground the motion picture in question was obscene. That court sustained the disapproval of a license. This Court reversed in a *per curiam* decision, upon a challenge to the vagueness of the word, "obscene". Whether this Court held there, that the word "obscene" is unconstitutionally vague is not clear. The decision may have rested on the *Stromberg* v. *California*, 283 U. S. 359 rule, that when there are several charges set forth and the defective one cannot be separated from the others, then the entire judgment will be reversed.

See also, *Musser* v. *Utah*, 333 U. S. 95, holding vague "injurious to public morals"; *Gelling* v. *Texas*, 343 U. S. 960, holding vague "sexually immoral"; *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, holding "sacrilegious" to be vague; *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587, holding "immoral" as vague.

CONCLUSION

This Court has for decision a case dealing with the limitations of expression in relation to obscenity. It is in a field of utmost confusion and its consequential abuses. It is not the fate of the books in this case or of the petitioner that alone are at stake. The principles to be announced will set a pattern for prosecutions even under State laws.

We have tried to show, that prosecutions under obscenity laws—Federal or State, are rampant. The censors are on the loose, each one armed with his version of what the

law means. It is submitted that this Court clarify the law so that the constitutional safeguards of a citizen may be realized and his civil liberties may be protected.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein prays for a rehearing and reversal of the decision of this Court of June 24, 1957, 25 U. S. Law Week 4539, affirming a judgment of the Court of Appeals for the Second Circuit, 237 F. 2d 796 (1956), affirming a judgment of the District Court for the Southern District of New York, which imposed on petitioner the harsh sentence of five (5) years plus a fine of Five Thousand ($5,000) Dollars for the violation of a federal obscenity statute, 18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183, the constitutionality of which the petitioner challenged under the First and Fifth Amendments and in this Court under the First, Fifth, Ninth and Tenth Amendments. This petition for rehearing is based upon two substantial grounds available to the petitioner although not previously presented.

I.

The framers of the First Amendment intended that the states and the states alone should have power over such offenses as obscenity and seditious libel.

The majority opinion states:

> "The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes." 25 U. S. Law Week at 4540-41.

This but emphasizes the fact that the framers of the First Amendment intended the states and the states alone to have power over such offenses as obscenity and seditious libel.

The ten states to which the majority opinion refers are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia. These ten states reduce to nine as of the date when the first Congress proposed the first Ten Amendments (September 25, 1789); for the constitution of one of them, Delaware, to which reference is made, dates from 1792.

Moreover, these state constitutional provisions were not always in as sweeping terms as the First Amendment. For example, the Constitution of 1786 of the State of Vermont provided in Chap. I, § 15:

> "That the people have a right of freedom of speech and of writing and publishing their sentiments, concerning the transactions of government—and therefore the freedom of the press ought not to be restrained." 2 Poore, *The Federal and State Constitutions*, 1869 (2d ed. 1878).

Furthermore the state constitutional provisions at times contained express exceptions. For example, the Pennsylvania constitution of 1790 contained an express exception for seditious libel. This constitution provided in Art. IX, § 7:

> "That the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no laws shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." 2 Poore, *The Federal and State Constitutions*, 1554 (2d ed. 1878).

The Delaware Constitution of 1792 contained a similar exception. Art. I, § 5 provided:

> "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty. In prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury may determine the facts and the law, as in other cases." 2 Poore, *The Federal and State Constitutions*, 278 (2d ed. 1878).

The South Carolina constitution of 1790 contained an express exception for acts of licentiousness. Art. XIII, § 1 provided:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or

> preference, shall forever hereafter be allowed within this State to all mankind: *Provided*, That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." 2 Poore, *The Federal and State Constitutions*, 1632-33 (2d ed. 1878).

It is interesting to note that the constitutions of two states, Pennsylvania and Delaware, contained express exceptions in their free speech guarantees for the offense of sedition. This supports the position of such men as Thomas Jefferson, James Madison, John Nicholas, Nathaniel Macon, Edward Livingston, Albert Gallatin, and John Taylor of Caroline in their attack on the Sedition Act of 1798 that the crime of seditious libel fell only and exclusively within the area of state power. By way of contrast the First Amendment provided in unqualified language that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

In our brief for petitioner (pp. 10-12) and our reply brief (pp. 9-12) we quoted Jefferson and Madison in this regard. Other leaders took the same position. John Nicholas of Virginia in arguing against the passage of the Sedition Act of 1798 stated:

> "* * * He had heard it said that all the States take cognizance of offenses of this sort. But does that give the power to the General Government? Because the States declare certain things offences, have the General Government power over the like offences? If so, it would have a concurrent power with all the State Governments, which, he believed, would be a novel idea. Indeed, he was utterly at a loss to find any ground upon which to found a law of this kind. He was confident there was none." *Annals of Congress* 2142, 5th Cong., 2d Sess. (1798).

Nathaniel Macon of North Carolina argued:

> "* * * He thought this subject of the liberty of the press was sacred, and ought to be left where

> the Constitution had left it. The States have complete power on the subject, and when Congress legislates, it ought have confidence in the States, as the States ought also to have confidence in Congress, or our Government is gone * * *." *Annals of Congress* 2152, 5th Cong., 2d Sess. (1798).

Edward Livingston of New York similarly stated:

> "* * * Every man's character is protected by law, and every man who shall publish a libel on any part of the Government, is liable to punishment. Not, said Mr. L., by laws which we ourselves have made, but by laws passed by the several States. And is not this most proper? * * * " *Annals of Congress* 2153, 5th Cong., 2d Sess. (1798).

One more observation is pertinent here, and that is that the states did not always observe their own constitutional provisions. As Madison pointed out when he submitted his proposed amendments to the first Congress in June 1789:

> "* * * It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides this security there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure

guardians of the people's liberty * * *." 1 *Annals of the Congress of the United States* 439 (Gales Comp. 1834).

"Here," in the words of Irving Brant, "was not only the doctrine of judicial review but the lusty germ of the Virginia and Kentucky Resolutions." Brant, *James Madison Father of the Constitution* 267 (1950).

A little over a decade after Madison in his *Report* on the Virginia Resolution of 1798 cut the ground from under the argument that Congress had power to punish crime under the common law of England, this Court in *United States* v. *Hudson and Goodwin*, 11 U. S. (7 Cranch.) 32 (1812), decided in accordance with the position which Madison had taken in his *Report*. That case involved an indictment for a libel on the President and the Congress. This Court in ruling against the indictment specifically stated that "although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and a general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition." At 32.

It is thus clear that the framers of the First Amendment intended the crime of seditious libel to be solely and exclusively within state power. *A fortiori* they would have taken the same position with reference to such offenses as blasphemy and profanity, and later still obscenity. As we pointed but in our reply brief (pp. 7-8) the first reported case on obscenity in this country was not decided until 1815 (*Commonmealth* v. *Sharpless*, 2 S. & R. (Pa.) 91), almost a quarter of a century after the First Amendment was adopted.

II.

All utterances, when unconnected with criminal conduct, are entitled to the protection of the First Amendent.

At the 1956 term this Court in a series of cases had before it questions of the meaning and scope of "the sweeping command" (*Abrams v. United States*, 250 U. S. 616 631 [1919].) (dissenting opinion of Justice Holmes) of the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." The questions which these cases presented in one aspect or another concerned the problem of the circumstances, if any, under which speech that has not yet resulted in criminal deeds can constitutionally be punished, restrained or regulated. Five cases involved obscenity statutes. These covered the field, on a federal as well as a state level, in the criminal as well as the civil area. In the instant case the Court sustained the validity of a federal criminal obscenity statute and, in *Alberts v. California*, 25 U. S. Law Week 4539 (June 24, 1957), a state criminal obscenity statute. The Court in an opinion by Mr. Justice Brennan held "that obscenity is not within the area of constitutionally protected speech or press." At 4542. Mr. Justice Black and Mr. Justice Douglas dissented in both cases, and Mr. Justice Harlan in the instant case. Mr. Justice Douglas in his dissent, in which Mr. Justice Black concurred, stated:

> "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." At 4551.

Mr. Justice Harlan dissented on the ground that the First Amendent's prohibitions placed a greater restriction on federal power than the Fourteenth Amendment's provision, "nor shall any State deprive any person of life,

liberty, or property, without due process of law," placed on state power. In *Kingsley Books, Inc.* v. *Brown*, 25 U. S. Law Week 4557 (June 24, 1957), the Court in a five to four decision upheld a New York statute which provided for civil non-jury injunctive proceedings against obscene publications. Mr. Justice Frankfurter delivered the Court's opinion. He did not think that the statute constituted proscribed prior restraint. Mr. Justice Douglas and Mr. Justice Black thought that it did. Mr. Chief Justice Warren in his dissent stated: "It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the constitution." At 4760. In *Adams Newark Theatre Co.* v. *Newark*, 25 U. S. Law Week 3381 (June 24, 1957), the Court on the authority of the preceding three cases in a *per curiam* decision sustained the validity of a Newark ordinance which forbade stage performers to expose certain parts of their bodies and to use profane, lewd or lascivious language. In the fifth case, *Butler* v. *Michigan*, 352 U. S. 380 (1957), the Court unanimously invalidated a state statute which made criminal the general sale or distribution of literature "tending to incite minors."

Six cases involved judgments of conviction under the Smith Act against leaders of the American Communist Party. Two of these cases, *Scales* v. *United States*, 350 U. S. 992 (1956), *granting cert.* to 227 F. 2d 581 (4th Cir. 1955), and *Lightfoot* v. *United States*, 350 U. S. 992 (1956), *granting cert.* to 228 F. 2d 861 (7th Cir.), arose out of prosecutions against individuals under that provision of the act which makes it a crime to be a member of an organization that advocates the forcible overthrow of the government, "knowing the purposes thereof." The Court heard arguments in these two cases but restored them to the docket for reargument at the 1957 term. *Scales* v. *United States*, *Lightfoot* v. *United States*, 77 S. Ct. 1278 (1957).

The remaining four of these six cases arose out of conspiracy prosecutions. Three, *Yates* v. *United States*, *Schneiderman* v. *United States*, and *Richmond* v. *United States*, 25 U. S. Law Week 4475 (June 17, 1957), resulted from a judgment of conviction against fourteen persons in the Los Angeles prosecution. The Court reversed, ordering an acquittal as to five of the defendants and a new trial as to the remaining nine. Mr. Justice Harlan wrote the Court's opinion. Mr. Justice Brennan and Mr. Justice Whittaker, who were not members of the Court when these cases were argued, took no part in their consideration or decision. Mr. Justice Black and Mr. Justice Douglas concurred in part and dissented in part: they would have directed the acquittal of all of the defendants. Mr. Justice Clark dissented. One of the grounds of the reversal was the trial judge's refusal to charge, in terms of the trial court's charge in *Dennis* v. *United States*, 341 U. S. 494 (1951), that the advocacy of violent overthrow "be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit." 341 U. S. at 512. Instead the trial judge charged:

> "The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence." 25 U. S. Law Week at 4479.

The Court felt that this instruction defined advocacy too much in terms of the teaching of abstract doctrine rather than incitement to illegal action: "The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court, beginning with

Fox v. *Washington* * * * and *Schenck* v. *United States* * * * *", 25 U. S. Law Week at 4480. Mr. Justice Black and Mr. Justice Douglas dissented on the same ground as in the *Dennis* case, that the advocacy provision of the Smith Act violated the First Amendment. Mr. Justice Black, in an opinion in which Mr. Justice Douglas joined, wrote:

> "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal." 25 U. S. Law Week 4487.

Mr. Justice Clark could not draw the distinction which the Court did between the charge in the *Dennis* case and that in the *Yates, Schneiderman,* and *Richmond* cases. He wrote:

> "While there may be some distinctions between the charges, as I view them they are without material difference. I find, as the majority intimates, that the distinctions are too 'subtle and difficult to grasp.'" 25 U. S. Law Week 4490. (June 24, 1957).

In the Sixth Communist case, *Wellman* v. *United States,* 25 U. S. Law Week 3382 (June 24, 1957), arising out of a conspiracy conviction in Detroit, the Court vacated the judgment of affirmance of the Court of Appeals for the Sixth Circuit, and remanded the case for further consideration in the light of the Court's decision in the *Yates, Schneiderman,* and *Richmond* cases.

One case dealt with a state anti-picketing statute: in *International Brotherhood of Teamsters* v. *Vogt, Inc.,* 25 U. S. Law Week 4504 (June 17, 1957), the Court in a five to three decision sustained the validity of a Wisconsin statute which prohibited even peaceful picketing when done for organizational purposes. Mr. Justice Douglas, in a dissenting opinion in which Mr. Chief Justice Warren and Mr. Justice Black joined, urged that speech when unconnected with conduct should be wholly free: "I would return to the test enunciated in *Giboney*—that picketing can be regulated or prohibited only to the extent that it forms

an essential part of a course of conduct which the State can regulate or prohibit." 25 U. S. Law Week at 4507.

These cases call for a re-examination of the circumstances leading to the adoption of the federal Bill of Rights, the framers' intent in drafting the First Amendment, its subsequent construction, particularly the development and application of Mr. Justice Holmes' clear and present danger test, which he enunciated in *Schenck* v. *United States*, 249 U. S. 47 (1919), and the respective areas of federal and state power. It is submitted that at least so far as Congress is concerned speech is as free as thought, and that unless and until speech becomes a part of a course of conduct which Congress can restrain or regulate no federal legislative power over it exists. State power, despite the Fourteenth Amendment, may be somewhat more extensive. Certainly the framers of the First Amendment intended that it should be.

In our reply brief (pp. 10-12) we called attention to Madison's criticism in his *Report* of the bad tendency doctrine and his suggestion that federal power was limited to acts and could not apply to speech alone.

On the floor of Congress John Nicholas of Virginia pointed out the fallacy of the bad tendency doctrine and the danger in the position which gave Congress the power to punish other than acts. The occasion was the debate on the report of a select committee on petitions praying for a repeal of the alien and sedition laws. Nicholas cautioned:

> The suggestion on which the authority over the press is founded, is, that seditious writings have a tendency to produce opposition to the Government. What has a greater tendency to fit men for insurrection and resistance to Government, than dissolute, immoral habits, at once destroying love of order, and dissipating the fortune which gives an interest in society?

> "The doctrine that Congress can punish any act which has a tendency to hinder the execution of the laws, as well as acts which do hinder it, will, therefore, clearly entitle them to assume a general guardianship over the morals of the people of the United States." 3 *Annals of Congress* 3004-05 (1799).

Such a result was of course contrary to anything this country's founders had in mind.

Jefferson had made these points earlier and in a more direct and even stronger fashion. In his draft of *A Bill for Establishing Religious Freedom*, which he introduced into the Virginia Assembly in 1779, and which passed that body in 1785, he stated:

> "* * * that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; * * *." 2 *The Papers of Thomas Jefferson* 545-46 (Boyd ed., 1950); 12 *Laws of Virginia*, 84, 86 (Hening 1823).

And before Jefferson drafted this bill the Rev. Philip Furneaux, a dissenting divine, in one of a series of famous letters to Blackstone, which were published in book form in London in 1770, and in Philadelphia three years later, had eloquently urged the same approach:

> "If it be objected, that when the tendency of principles is unfavourable to the peace and good order of society, as it may be, it is the magistrate's duty then, and for that reason, to restrain them by penal laws: I reply, that the tendency of principles,

tho' it be *unfavourable*, is not *prejudicial* to society, till it issues in some *overt acts* against the public peace and order; and when it does *then* the magistrate's authority to punish commences; that is, he may punish the *overt acts*, but not the *tendency*, which is not actually hurtful; and, therefore, his penal laws should be directed against *overt acts only*, which are detrimental to the peace and good order of society, let them spring from what principle they will; and not against *principles* or the *tendency* of principles.

"The distinction between the tendency of principles, and the overt acts arising from them is, and cannot but be, observed in many cases of a *civil* nature; in order to determine the bounds of the magistrate's power, or at least to limit the exercise of it, in such cases. It would not be difficult to mention customs and manners, as well as principles, which have a tendency unfavourable to society; and which, nevertheless, cannot be restrained by penal laws, except with the total destruction of civil liberty. And here the magistrate must be contented with pointing his penal laws against the evil overt acts resulting from them * * *. Punishing a man for the *tendency* of his principles, is punishing him *before* he is guilty, for fear he *should* be guilty." *Letters to the Honourable Mr. Justice Blackstone* 62-63 (2d ed. 1771).

So, too, had Montesquieu, the oracle of the founding fathers, and Jeremy Bentham; although Montesquieu had added a nullifying qualification. Montesquieu in his *L'Esprit des Lois* (1748) in a chapter entitled, "Of Indiscreet Speeches," had written:

"Words do not constitute an overt act * * *. Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal, but when they are annexed to a criminal action: everything is con-

> founded, if words are construed into a capital crime, instead of considering them only as a mark of that crime." Bk. 12, c. 12.

The framers of the First Amendment were wise enough not to follow Montesquieu in his exception.

Bentham in his *A Fragment On Government* (1776) which was a criticism of Blackstone's exposition in his *Commentaries* on the nature of sovereignty, in explaining the difference between a free and a despotic government, stated that one of the distinguishing circumstances lay in "the security with which malcontents may communicate their sentiments, concert their plans, and practice every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them." At 95 (Harrison ed. 1948).

Jefferson's classic statement from his draft of *A Bill for Establishing Religious Freedom* did not go wholly unnoticed. Mr. Justice Black in his concurring and dissenting opinion in the *Yates*, *Schneiderman* and *Richmond* cases, in which Mr. Justice Douglas joined, quoted the latter part of it. 25 U. S. Law Week at 4487. So, too, did Mr. Justice Douglas in his dissenting opinion in the *Dennis* case. 341 U. S. at 590.

It is submitted that it was Jefferson's and Madison's distinction between speech and conduct, between the word and the criminal deed, which Mr. Chief Justice Warren had in mind in the instant case when he stated in his concurring opinion:

> "The conduct of the defendant is the central issue, not the obscenity of a book or picture." 25 U. S. Law Week at 4545.

It is further submitted that it was this distinction which he had in mind in *Kingsley Books Inc.* v. *Brown*, 25 U. S.

Law Week 4557 (June 24, 1957), when he stated in his dissenting opinion in that case:

> "It is the conduct of the individual that should be judged, not the quality of art or literature." 25 U. S. Law Week 4560.

The Court should re-examine its interpretation and application of the First Amendment, and rule that under it all utterances, when unconnected with criminal conduct, are entitled to protection.

CONCLUSION

We respectfully pray that this petition for rehearing be granted and that this case, like *Scales* v. *United States*, 77 S. Ct. 1278 (1957), and *Lightfoot* v. *United States*, 77 S. Ct. 1278 (1957), be restored to the docket for reargument at the 1957 term.

While the severity of the sentence in this case (and of its severity there can be no doubt) is not open to review [see *Blockburger* v. *United States*, 284 U. S. 299 (1932); *Rosenberg* v. *United States*, 344 U. S. 889 (1952) (concurring opinion); *United States* v. *Rosenberg*, 195 F. 2d 583 (2d Cir.), *cert. denied*, 344 U. S. 838 (1952)], nevertheless the harshness of the sentence should underline the substantial nature of the two grounds presented in this petition for rehearing. *Cf. United States* v. *Hoffman*, 137 F. 2d 416 (2d Cir. 1943); *United States* v. *Trypuc*, 136 F. 2d 900 (2d Cir. 1943).

Upon rehearing, the judgment of this Court affirming the judgment of the Court of Appeals for the Second Circuit should be reversed and the federal obscenity statute,

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IN THE

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October Term, 1955

No. [redacted] 91

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT.

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I.

The California Penal Statute—proscribing "obscene and indecent" writings and books—upon its face and as construed and applied to appellant violates freedom of speech and press, and conflicts with the decision of Holmby Productions v. Vaughn, 350 U. S. 870. Additionally, within the area of freedom of speech and press, the statute, and the application thereof below, denied appellant substantive and procedural due process of law 9

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IN THE

Supreme Court of the United States

October Term, 1955

No. .....

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles entered and filed December 29, 1955, rehearing denied January 12, 1956. The Appellate Department of the Superior Court is the highest state court available to appellant. (Calif. Const., Art. VI, Sec. 5; *Edwards v. California,* 314 U. S. 160.)

Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles dated December 29, 1955 and the memorandum opinion denying a rehearing dated January 12, 1956 are both reported, *People v. Alberts,* 138 A. C. A. 513, 292 P. 2d 90. A copy of the Appellate Department's opinions and judgment is attached hereto as Appendix "A". The trial court wrote no opinion.

Jurisdiction.

Appellant was convicted on two counts of violating California Penal Code, section 311, subdivisions 3 and 4, making it a crime to advertise or keep for sale obscene books. He was placed on summary probation for two years and as a condition thereof ordered to serve 60 days in the county jail and pay a fine of $500.00. [C. T. p. 6.] The cause is one in which the validity of Penal Code, Section 311, was drawn in question in the Statement on Appeal to the Appellate Department [C. T. p. 12, line 25, to p. 13, line 12] on the ground of its being repugnant to the First and Fourteenth Amendments to the United States Constitution and to Article I, Section 8, Clause 7 of the United States Constitution. The State Court, in affirming the validity of Penal Code, Section 311, as applied to appellant, notwithstanding his assertion that it was repugnant to the United States Constitution, said:

> 1. "The words 'obscene or indecent' as used in . . . section 311 are not unconstitutionally indefinite . . . To be sure, it is not always easy to decide on which side of the line a book should be placed. . . ." [C. T. p. 83.]
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> 2. "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute (Section 311) inoperative." [C. T. p. 84.][1]

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[1]The Court did not discuss every feature of the case, saying in its memorandum opinion denying a rehearing [C. T. p. 99]:

> "We sympathize with the desire of counsel, who have earnestly argued a question, to have us explain how we arrived at an adverse answer. The number of cases that come before us is so great, however, that as a rule, we cannot gratify the understandable desire of counsel, for writing an opinion

Notice of Appeal to the Supreme Court of the United States was filed on March 26, 1956 in the Appellate Department of the Los Angeles Superior Court, State of California. [C. T. p. 257(a).][2] The jurisdiction of the Supreme Court to review this judgment is conferred by Title 28, United States Code, section 1257, subdivision 2. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 82; *Winters v. New York*, 333 U. S. 507; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870.

Statute Involved.

The statute, the validity of which was drawn in question, Penal Code, section 311, subdivision 3 and 4, provides:

"Every person who wilfully and lewdly, either: . . .

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . ."

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often takes more time than arriving at it. Our system of conference, before and after the call of the calendar, reduces to near the vanishing point the danger of one-man decisions, or decisions made without considering the points and authorities advanced."

[2]Volume 2 of Clerk's Transcript.

is guilty of a misdemeanor punishable by fine and imprisonment. As interpreted by the State Court: "A book is obscene 'if it has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desire.'" (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959.) The statute was applied in this case to the *mailing* of circulars advertising books and the keeping of books for sale *by mail*. The federal constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, particularly the provisions thereof respecting freedom of speech and press and respecting the guarantee of due process of law, and Article I, section 8, clause 7 respecting the postal powers of the federal government. Federal statutes involved are 18 U. S. C., section 1461 and 39 U. S. C., section 259(a), dealing with advertising and mailing obscene matter.

Constitutional Questions Presented.

This appeal presents the following questions under the Constitution of the United States:

(1) Whether the statute in the instant case, Penal Code, section 311, subdivisions 3 and 4, upon its face and as construed and applied, and the prosecution thereunder at bar, violates procedural and substantive due process of law and denies and/or abridges freedom of speech, press and thought, in contravention of the due process clause of the Fourteenth Amendment and the freedom of speech and press clauses of the First Amendment of the United States Constitution.

(2) Whether the statute in the instant case, Penal Code, section 311, subdivisions 3 and 4, as applied here to the *mailing* of circulars and the keeping of books for sale by *mail* is repugnant to Article I, section 8, clause 7 of the United States Constitution and unlawfully in-

fringes on a sphere of activity reserved exclusively to the federal government respecting which the federal government has fully legislated, preempting the field.

Nature of the Case.

The judgment sought to be reviewed here is a criminal conviction in two counts under section 311, subdivisions 3 and 4 of the California Penal Code for the keeping for sale by mail and for advertising by mail "obscene and indecent" books.

The case against appellant consisted simply of proving that he had in his warehouse a large assortment of merchandise, including the merchandise and circulars introduced as exhibits. [C. T. p. 9.]

Prior to his arrest and on February 25, 1955 appellant was served with a search warrant, and his business office and business warehouse as well as his residence were searched. The arresting officers seized and carried off as matters material to the arrest books, pictures and related matters to the number of "hundreds or possibly thousands," removing the items in "automobiles and a small truck." [C. T. pp. 43, 116, 243.]

The complaint was in the exact language of the statute [C. T. pp. 1-2] and the charge against appellant was simply that in the matters seized he had somehow violated Penal Code, section 311, subdivisions 3 and 4. The offending books or other items were not identified. At the trial the District Attorney selected from the hundreds or thousands of items seized 31 books, 10 magazines and a large number of pictures and introduced them in evidence together with three different advertising circulars and mailing labels. Some of the books introduced by the prosecutor were not obscene even in the judgment of the prosecutor. [C. T. p. 190.] Appellant was not advised in

advance which of the many items seized would be relied upon in the trial. Commenting on the complaint the Appellate Department said that while in its opinion no legal error occurred, "a decent regard to fair play would dictate that some attempt be made to have the charge fit the known facts. . . ." [C. T. p. 83.]

While pictures and books were introduced in evidence, the Appellate Department stated that its judgment affirming the conviction was based only upon a "keeping for sale" and "advertising" of *books* found to be "obscene and indecent." That Court said: "The defendant was convicted on two charges based on section 311 of the Penal Code: that he had lewdly kept for sale obscene and indecent books and that he had lewdly written, composed and published an advertisement of them." [C. T. p. 82, lines 24-27.] Later on the Court said: "Moreover, while the type of pleading being considered lends itself to an unfair prosecution, actually, in this case, the defendant was not prejudiced; he would have been no better off had the charge been simply that he kept obscene books for sale." [C. T. p. 83, lines 18-22.] And finally the Court said: "That some of the books were obscene we do not consider debatable." [C. T. p. 84, lines 6-7.]

The books introduced were introduced in groups, as collective exhibits, thirty-one books and ten magazines being offered under eight exhibit numbers as follows: Exhibit 1 (11 books), Exhibit 5 (9 books), Exhibit 9 (5 books), Exhibit 10 (10 magazines), Exhibit 11 (1 book), Exhibit 21 (4 books), Exhibit 22 (1 book). These several books grouped by exhibit numbers were:

Exhibit 1: "Ballad of a Nun and Other Poems", "Homosexual Life", "Letters of the Courtesans", "How to be Married Though Happy or How to be Happy Though Married", "The Prostitute and Her Lover", "The

Love Affair of a Priest and a Nun", "Amorous Tales of the Monks", "Wild Women of Broadway", "Strange Marriage Customs", "Confessions of a Minister's Daughter", "The Fleece of Gold".

Exhibit 5: "Petting as an Erotic Exercise", "Bestiality and the Law", "Male Homosexuals Tell Their Stories", "The Business Side of the Oldest Business", "Questions and Answers About Oragenital Contacts", "The Picture of Conjugal Love", "William Heirens—Notorious Sex Maniac", "Female Homosexuals—Lesbians Tell Their Stories", "Bestiality in Ancient and Modern Times".

Exhibit 9: "To Beg I Am Ashamed", "Witch on Wheels", "The Pleasures of the Torture Chamber", "Snow Job", "She Made It Pay".

Exhibit 10: Ten different issues of "Good Times" magazine.

Exhibit 11: "Sword of Desire".

Exhibit 21: "Padlocks and Girdles of Chastity", "Straps and Stripes", "Memoirs of a Spankee", "Slaves of the Lash".

Exhibit 22: "Unique for Lovers of the Unusual".

The trial judge found obscenity in the books in Exhibits 9 and 11 although admittedly he did not read the books in their entirety. [C. T. p. 205, line 12; p. 208, lines 20-26.] He stated and ruled that the books in Exhibits 1 [C. T. p. 198] and 5 [C. T. pp. 201-205] were not obscene and that the books and magazines in Exhibits 10, 21 and 22 would not be considered by him for the reason they were not shown to be kept for sale. [C. T. p. 211.] On appeal appellant argued that he could not be convicted for possession of the books in Exhibits

9 and 11 for the reason that they were not shown to have been kept for sale although the books in Exhibits 1 and 5 were shown to have been kept for sale. Replying to this argument the State in its brief before the Appellate Department and in argument to that Court urged that affirmance of that conviction could and should be placed on Exhibits 1 or 5 or some of the books therein notwithstanding that the trial court had found such books not to be obscene. [C. T. p. 50.] Appellant argued that the Appellate Department could not properly affirm the conviction below upon evidence which the trial court found would *not* support a conviction. [C. T. p. 76.] Pressed between the arguments of appellant and respondent the Appellate Court failed to designate which books were the basis of the conviction, merely stating that some of the books were obscene. Accordingly, appellant knows no more after trial and affirmance than he knew before as to which particular books offended the law.

Regarding the question of using the mails the admitted fact is that appellant operated a mail order business. [C. T. p. 41, lines 10-12.] Everything from beginning to end was done by the mails. From his business office appellant mailed out circulars and received orders. [C. T. p. 239.] He would then fill the orders by mail from the merchandise kept in the warehouse. [C. T. p. 239.] There was no evidence that any circulars were mailed to anyone in California nor was there proof of any sales in California. Appellant was convicted under Count II (Pen. Code, sec. 311, subd. 4) for mailing circulars [C. T. p. 193, lines 21-22] and under Count I (Pen. Code, sec. 311, subd. 3) for keeping in his warehouse books to fill by mail orders received by mail. [C. T. p. 249, lines 7-10; p. 239, lines 11-25; p. 225, lines 2-17; p. 141, lines 4-24; Ex. 7.]

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.

The California Penal Statute—Proscribing "Obscene and Indecent" Writings and Books—Upon Its Face and as Construed and Applied to Appellant Violates Freedom of Speech and Press, and Conflicts With the Decision of Holmby Productions v. Vaughn, 350 U. S. 870. Additionally, Within the Area of Freedom of Speech and Press, the Statute, and the Application Thereof Below, Denied Appellant Substantive and Procedural Due Process of Law.

1. The Statutory Standard—Proscribing "Obscene and Indecent" Literature—Violates the Decision in Holmby v. Vaughn, and Is Unconstitutionally Vague and Unconfined, and a Censorial Proscription of Ideas and Speech, Violating Freedom of Press and Speech Under the First and Fourteenth Amendments to the United States Constitution.

This Court in *Holmby Productions, Inc. v. Vaughn,* Oct. 24, 1955, 350 U. S. 870, rehear. den. 350 U. S. 919, held unconstitutionally vague and a violation of constitutional freedom of speech a state motion picture licensing statute proscribing motion pictures found to be "obscene". The state (Kansas) statute there involved provided for denial of licenses to pictures judged "obscene, indecent and immoral, and such as tend to debase and corrupt morals", and the State Supreme Court confined this by interpretation on appeal to the single term "obscene", holding that term valid and constitutional. (*Holmby Productions, Inc. v. Vaughn,* 177 Kan. 728, 282 P. 2d 412.) This Court reversed, holding the statute even as confined invalid and unconstitutional, citing *Joseph*

Burstyn, Inc. v. Wilson, 343 U. S. 495, and *Superior Films, Inc. v. Department of Education*, 346 U. S. 587. Although *Holmby* was without written opinion it is evident from the citation of the *Burstyn* and *Superior Films* cases its holding is that "obscene" is an unconstitutionally vague standard violating freedom of speech.

California Penal Code, Section 311, in prohibiting and providing penalty for "obscene and indecent" literature and writings establishes a standard indistinguishable utterly from the standard held void and unconstitutionally vague in the *Holmby* decision. In consequence the statute here as there is an invalid, censorial abridgement of freedom of speech and press, violating the First and Fourteenth Amendments.

The decision in *Holmby*, merely confirms and applies directly to the vague standard and term "obscene" the rule of a long accumulation of undeviating decisions of this Court holding void as against free speech, proscriptions or prohibitions against expression cast in vague, unconfined, censorial terms comparable in principle and in substance to the characterization "obscene", or to the similar term at bar, "indecent". Witness the standards or prohibitions held invalid in the decisions below listed:

Near v. Minnesota, 283 U. S. 697, 701-702 ("[any] malicious, scandalous and defamatory" publication);

Schneider v. New Jersey, 308 U. S. 147, 158 ("not of good character" or "not free from fraud");

Gelling v. Texas, 343 U. S. 960 ("[of] such character as to be prejudicial to the best interests of the people");

Superior Films, Inc. v. Dept. of Education, 346 U. S. 587 ("[not] of a moral, educational or amusing and harmless character");

Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 497 ("sacrilegious");

Commercial Pictures Corp. v. Regents of the University of New York, 346 U. S. 587 ("immoral . . . or . . . of such a character [as] would tend to corrupt morals");

Winters v. New York, 333 U. S. 507, 518-519 ("criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting . . . crimes");

Cantwell v. Connecticut, 310 U. S. 296, 301-302, 305 (a cause not found to be "religious");

Musser v. Utah, 333 U. S. 95, 96 (speech constituting a "conspiracy" "to commit acts injurious to public morals");

Thornhill v. Alabama, 310 U. S. 88, 91-92 (picketing "without a just cause or legal excuse");

Carlson v. California, 310 U. S. 106, 109-112 ("loitering" or "picketing" for objects characterized by this Court as "sweeping and inexact");

Largent v. Texas, 318 U. S. 418, 419 ("proper or advisable");

Hague v. C. I. O., 307 U. S. 496, 502, 516-517, (parading without approval of city officer under standard of "the purpose of preventing riots, disturbances or disorderly assemblage");

Kunz v. New York, 340 U. S. 290-291, 293 (licensing power under standard "for good reasons");

Herndon v. Lowry, 301 U. S. 242, 263-264 (prohibition of advocacy amounting in this Court's characterization "nearly to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that

he ought to have foreseen his words would have some effect in the future conduct of others");

Stromberg v. California, supra, 283 U. S. 359, 369 (prohibition of advocacy of "opposition to organized government" characterized by this Court as possessed of "indefiniteness and ambiguity" making it possibly inclusive of peaceful advocacy of change "by legal means and within constitutional limitations");

Lovell v. City of Griffin, 303 U. S. 444, 447-448 (leaflet licensing statute without any standard);

Jones v. Opelika, 319 U. S. 103, 104 (leaflet licensing statute without any standard);

Saia v. New York, 334 U. S. 558, 559-560 (sound truck permit statute without any standard);

Niemotko v. Maryland, 340 U. S. 268, 269-272 (Park address permit "custom" without any standard).

That the statute in *Holmby* was a licensing statute where the law here involved is a direct criminal enactment is not critical in significance and does not distinguish between the cases. Such difference is without significance or force where the question concerned is the question of whether the standard established for determining the permissible content of speech is invalid for being unconfined and unconstitutionally vague. While "prior restraint" as opposed to "subsequent punishment" may be more aggravated generally as a form for regulating speech, the central evil inhering in an unconfined and unconstitutionally vague standard affecting speech and press is the vice of *total and arbitrary power of censorship* inviting and authorizing the enforcer to punish or permit speech and press in purely discretionary manner and as dictated by his will alone. In the words of this

Court in *Near v. Minnesota*, 283 U. S. 697, 713, it is "this" which "is of the essence of censorship", and it is not critical in importance whether the person invested with such arbitrary totality of power over speech or press is privileged to exert it before or only after the fact of utterance or publication. The vice of *all* such statutes is that within the area of free speech they create "no narrowly drawn limitations; no circumscribing of . . . arbitrary power", but to the contrary subordinate liberty of expression to "the invalidity . . . of limitless discretion." (*Niemotko v. Maryland, supra*, 340 U. S. 268, 272.) They "license the jury [or other enforcing agency or officer] to create its own standard in each case." (*Herndon v. Lowry, supra*, 301 U. S. 242, 263.) Such a law is a ready "instrument of arbitrary suppression of free expression of views", and exercised or not "[makes] enjoyment of . . . freedom [of expression] which the constitution guarantees contingent upon the uncontrolled will of [governmental] officers." (*Hague v. C. I. O.*, 307 U. S. 496, 502, 516.) Such statutes violate the basic-most command of the constitution as to free speech that "restraint . . . be defined by clear and guarded language." (*Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 296.)

Even a prior restraint statute, such as one requiring a license or permit, may be valid and may be sustained if under its terms the licensing authority is rigidly denied "arbitrary power or . . . unfettered discretion" and is required to act upon licenses "free from improper . . . considerations and from unfair discrimination" and solely for such narrow considerations of public convenience as affect "the time, price and manner" of exercising speech or the right to parade. (*Cox v. New*

Hampshire, 312 U. S. 569, 576.) Prior restraint which is rigidly "uniform, nondiscriminatory" and "ministerial", and leaving to licensing boards "no discretion" over permissible content, is constitutional notwithstanding the restraint form. (*Poulos v. New Hampshire*, 345 U. S. 395, 402-404.) Equally, and by exactly counterpart considerations, a standard even for subsequent criminal punishment cast in so vague and indeterminate a manner as to permit the enforcer to exercise, assert or threaten arbitrary, discretionary and unconfined power of enforcement, as at bar, is unconstitutional, and is as censorial in consequence and effect as is arbitrary power in form of prior restraint.

> "A like threat [to the vice of prior licenseship under arbitrary, discretionary standard] is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective, or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by [arbitrary licenseship]."
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> *Thornhill v. Alabama*, 310 U. S. 88, 98.

Accord: *Herndon v. Lowry*, 301 U. S. 242; *Stromberg v. California*, 283 U. S. 459; *Winters v. New York*, 333 U. S. 507; *Butler v. Michigan*, No. 548, Oct. 1955 Term, probable jurisdiction noted.

Moreover, the differences between subsequent and prior restraint can lose all substance where arbitrary standards are suffered to exist. In *Near v. Minnesota, supra*, the parent "prior restraint" case, the restraint most condemned was a continuing *future injunction* against any "malicious, scandalous and defamatory" writing by the defendant—a judicial order indistinguishable in substance and effect (save only for absence of right to jury trial in enforcement) from a criminal law prohibiting speech within a statutory category of comparable censorial terms. A statute as at bar falling upon "possession for sale" can operate as much in advance of actual distribution and reading as enforcement of a licensing or permit law. Additionally, as is well illustrated in the "obscenity" area, police threats under broad and loose criminal statutes, rising even to the issuance of lists of "disapproved" books, can as effectively smother and intimidate publication of expression as any conventional class of "prior restraint." (*Bantam Books v. Melko*, 25 N. J. Super. 292, 96 A. 2d 47; *New American Library of World Literature v. Allen* (U. S. D. C. E. D. Ohio, 1953), 114 Fed. Supp. 823.)

That the standard "obscene" at bar, held void in *Holmby*, is truly censorial and arbitrary is strongly confirmed by history. Illuminating examples of suppressions of notable works of criticism and of literature, confirm the gravity of the censorship power over free expression which inheres in punishment or prohibition of "obscene"

literature. The greatest classics of art and literature have been thus condemned.[3]

In *Lord Byron v. Dugdale,* 1 L. J. Ch. 239 (1823), the book "Don Juan" was held obscene. In *Southey v. Sherwood,* 2 Meriyale 437 (1817), Lord Eldon condemned the poem "Wat Tyler" as "not an innocent publication", and in *Murray v. Benbow,* Jac. 474, n., Lord Eldon ruled illegal as obscene Lord Byron's poem "Cain", and expressed misgiving as well about Milton's "Paradise Lost". In *Moxon's Case* (1841), 2 Townsend, Mod. St. Tr. 356, Shelley's "Queen Mab" was ruled an indictable offense.

Similarly, in our country, in *Commonwealth v. Friede,* 271 Mass. 318, 171 N. E. 472, a jury was suffered to find

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[3] " 'Gulliver's Travels', [was suppressed] in Ireland [because] considered obscene and detrimental to both government and morals; * * * And Dante's 'Devine Comedy' was burned in France in 1318, and fell under the Inquisition in Lisbon in 1581."

A. L. Haight "Banned Books", Introduction, pp. xi-xii.

"Those who have presumed to judge literature throughout the centuries of time have been guilty of gross blunders, absurd anomalies and ridiculous errors. When Dean Swift wrote his immortal, scathing satire on English life and politics, 'Gulliver's Travels,' he was denounced on all sides as wicked and obscene. Agitation was excited by the book. It was declared to be a vile and slanderous book, and the writer a lecherous hypocrite. But what has time done to this book? It is no longer considered as immoral and dangerous; instead, the satire has been overlooked, and the obscenity forgotten, and it is today a rare tale of adventure for the young. Lemuel Gulliver is no longer a symbol, the Yahoos represent nothing, the book is avidly perused by children with the same eagerness with which they read the adventures of the 'Rover Boys', or 'Deadwood Dick.'"

10 Boston Univ. L. Rev., "Massachusetts and Censorship," Sidney S. Grant and S. E. Angoff, 36, 188.

In IV Encyclopedia Britannica, "Suppression of Books," at pp. 246-247, it is stated:

"The list of prose works banned during past and present centuries includes Homer's 'Odyssey,' 'Cervantes' 'Don Quix-

"obscene" Theodore Dreiser's "An American Tragedy." In *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840, a like fate befell Lillian Smith's "Strange Fruit." In *People v. Friede*, 233 N. Y. Supp. 565, Radclyffe Hall's "The Well of Loneliness," a serious study of Lesbianism, was held punishable as obscenity. In *Commonwealth v. De Lacey*, 271 Mass. 327, 171 N. E. 455, B. H. Lawrence's "Lady Chatterly's Lover" was similarly treated.

Contradictory results have been reached. In *Attorney General v. Book Named "God's Little Acre,"* 326 Mass. 281, 93 N. E. 2d 819, Erskine Caldwell's study of Southern Share-Cropper Life was found obscene and criminal, indeed so totally so as to be constituted thus as a matter of law and beyond room for difference of reading and requiring reversal of a contrary conclusion by the trial judge

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ote,' La Fontaine's 'Fables,' Defoe's 'Robinson Crusoe,' Swift's 'Tale of a Tub,' and 'Gulliver's Travels,' Voltaire's 'Candide,' Feilding's 'Pasquin,' Richardson's 'Pamela,' Casanova's 'Memoirs,' Goethe's 'Faust' and 'Sorrows of Werther,' Gibbon's 'Decline and Fall of the Roman Empire,' Sterne's 'Droll Stories,' Flaubert's 'Madam Bovary,' Maupassant's 'Une Vie' and 'L'Humble Verite,' Stowe's 'Uncle Tom's Cabin,' Hawthorne's 'The Scarlet Letter,' Eliot's 'Adam Bede,' George Moore's 'Flowers of Passion,' Zola's 'Nana,' Hardy's 'Tess of the d'Urbervilles,' Upton Sinclair's 'Oil,' Cabell's 'Jurgen,' Lawrence's 'Woman in Love,' Sinclair Lewis' 'Elmer Gantry,' and Remarque's 'All Quiet on the Western Front.' On the poetry roster we find Dante's 'Divina Commedia' and 'De Monarchia' Shelley's 'Queen Mab,' 'Rossetti's Poems,' Baudelare's 'Fleurs de Mal,' Whitman's 'Leaves of Grass,' Elizabeth Barrett Browning's 'Aurora Leigh,' and Swinburne's 'Poems and Ballads.'"

Books banned in Boston as "obscene" have included writings by such illustrious authors as: Sherwood Anderson, Conrad Aiken, John Ervine, Bertrand Russell, William Faulkner, Lion Feuchtwanger, Theodore Dreiser, H. G. Wells, John Dos Passos, Ben Hecht, Sinclair Lewis, Ernest Hemingway, Robert W. Service, and Judge Ben Lindsey. (Collected in Comment, 10 Boston Univ. L. Rev., "Massachusetts and Censorship," 36, 47, n. 54; see also Ernst and Seagle "To the Pure," Appendix II.)

in the lower court. The same book by the same author was found not obscene in New York in *People v. Viking Press,* 264 N. Y. Supp. 534, and likewise not obscene in Pennsylvania in *Commonwealth v. Gordon* (Pa.), 66 D. & C. 101. Similarly, in *Commercial Pictures Corp. v. Regents,* 346 U. S. 587, this Court reversed a motion picture censorship affecting the motion picture, "La Ronde." In *People v. Pesky,* 243 N. Y. Supp. 193 (affirmed, 254 N. Y. 373, 173 N. E. 227), the English translation of the ten dialogues by Arthur Schnitzler upon which the picture "La Ronde" had been based, appearing in the English translation under the title "Hands Around" was held criminally obscene.

"Gross blunders, absurd anomalies and ridiculous errors" (10 Bos. Univ. U. Law Rev. 36, 118) are necessary comcomitants of an attempt to condemn a book as obscene under the web of generalities woven into the definition of that term. This is particularly so where, as here, the statute is focused upon *thoughts,* rather than conduct. As interpreted California Penal Code, section 311, outlaws books which arouse "lascivious thoughts" and "lustful desires" (*People v. Wepplo,* 73 Cal. App. 2d (Supp.) 959).

> "But what kind of thoughts, desires, imaginations and impulses are impure, lascivious, lecherous, libidinous, lustful, lecherous (*sic*), sensual or sexual—apart from the fact that these terms relate to sex? Do these terms embrace all normal sexual intercourse? If so, within wedlock or only without? Or do they embrace only thoughts of sexual perversion?

> The cases clearly answer the last question. . . . Many books have been held obscene that deal only with normal sexual relations that could not possibly suggest thoughts of perversion."[4]
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> 20 Law and Contemporary Problems, Obscenity in the Arts, 531, 591.

It is unthinkable that in a democratic society, where government may make no law restricting freedom of thought and press, a man may be jailed for distributing a book which may arouse sex desires, especially in a day and age characterized by a revealing frankness and realism regarding sex. (See Arthur Lippman's "A Preface to Morals", pp. 285, 300, where he speaks of "man's immense preoccupation with sex", and of the "immense and urgent discussions of sex throughout the modern world".) Moreover the issue involved in censoring supposedly obscene matter goes much deeper than would appear at first sight. Much of what was said in *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 504-505, is here applicable:

> "This [standard of 'sacrilegious'] is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York Courts, the censor is set adrift upon a boundless sea amid a myriad of

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[4]Some courts have felt that the arousal of normal sexual desires is not criminal (*State v. Lerner* (Ohio), 81 N. E. 2d 282, 286):

> "Pure normal sex ideas are all right. All of mankind have sex ideas. Nature is aflame with sex ideas—the hoot of the owl, the coo of the dove, the blossoms of the flowers, plants and trees, the spawning of the fish. Sex is the why and wherefore of life and living."

> conflicting currents of religious views. . . . Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority."[5]

It is a major premise of the obscenity laws (including Penal Code section 311) and of the Catholic and some other religions that the arousal of sexual ("lustful") desires is wrong *per se*. This is by no means true of all religions. Under the First Amendment government should not force upon any segment of society the views of any religious sect.

If then the control of sex thoughts is a matter particularly invested with First Amendment overtones the following language from *Winters v. New York*, 333 U. S. 507, 510, is, *a fortiori*, applicable to the instant case.

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas [or to the distribution only of assumedly 'good' books]. The line between

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[5]The word "obscene" too is charged with religious significance. ". . . the word *obscenum* . . . is uncomplicated and clear in Catholic legal and moral thought; . . . it is, in fact, thought of as being rather self-evident." *Moral Definition of the Obscene* by Harold C. Gardiner, S. J. 20 Contemporary Legal Problems 560, 561. See Joseph Buckley, *Christian Design for Sex* (1952). Speaking of the question posed by the book *Played by Ear* by the late Rev. Daniel A. Lord a Jesuit priest who claimed that he and he alone authored Hollywood's Production Code, *Weekly Variety*, April 4, 1956, page 5, said:

> "What is unquestionably true, however, and borne out by current writings on the topic, is that the basic document originated entirely in Catholic quarters without reference to or consultation with spokesmen of other denominations. Defenders of the Code have always held that it is interdenominational in character, setting up a moral yardstick acceptable to all."

> the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

2. This Case Presents in an Important Respect the Same Question Posed in Butler v. Michigan, Probable Jurisdiction Noted This Term.

This term probable jurisdiction was noted in *Butler v. Michigan;* No. 548, October 1955 term. In that case, there was a conviction for distributing an obscene book. There, as here, the obscenity statute was attacked on the ground that the statute was so vague and indefinite, in form and as interpreted, as to permit within its scope the punishment of incidents fairly within the protection of the guarantee of free speech and press, in violation of the Fourteenth Amendment.

The Michigan and California statutes, as interpreted, are strikingly similar. Penal Code, section 311, has been authoritatively interpreted in the case of *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, where the Court said:

> "A book is obscene 'if it has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desires. . . .'"[6]

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[6]"If an average man reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the pages that have no business there. How can anyone say that he will infallibly be affected one way or another by one book or another? When, where, how and why are questions that cannot be answered clearly in this field." (*Commonwealth v. Gordon* (Pa.), 66 D. & C. 101.)

The trial court in its oral opinion relied upon this language in the *Wepplo* case. [C. T. p. 197.] When an authoritative court interprets a statute the court's interpretation is put in the statute "as definite as if it had been so amended by the legislature." (*Winters v. New York*, 333 U. S. 507.)

As interpreted by the California courts, Penal Code, section 311(3) reads:

> "Every person who . . . keeps for sale . . . any obscene or indecent . . . book . . . which has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desires"

is guilty of a misdemeanor.

The Michigan statute (M. S. A. 28.575) involved in *Butler v. Michigan* provides:

> "Any person who shall . . . possess with the intent to sell . . . any book . . . containing obscene, immoral, lewd or lascivious language . . . manifestly tending to the corruption of the morals of youth is guilty of a misdemeanor. . . ."

In *Butler v. Michigan*, one of the issues raised is whether the Michigan statute

> "is so vague and indefinite as not to comport with due process because its provisions prohibit and punish the publication and distribution of a book if such book contains matter which tends to incite minors to wrongful conduct and corrupt their morals—a wholly vague criminal prescription, predicated upon unascertainable and indefinite standards of conduct." (Appellant's Jurisdictional Statement, p. 4.)

Thus this case presents in important respect virtually the identical question posed in *Butler v. Michigan,* and should be considered with that case.

3. The Construction and Application of the Statute at Bar, and the Prosecution Conducted Under the Said Statute in the Proceedings Below, Particularly Violate Procedural and Substantive Due Process of Law, and Deny and Abridge Freedom of Speech, Press and Thought in Particular and Aggravated Manner, All in Contravention of the First and Fourteenth Amendments.

In this case, as we have seen, *supra,* pp. 5-8, the charge against appellant was so lacking in specificity, there were so many books involved, and such confusion as to which books the respective courts found criminally obscene that even now after affirmance on appeal it is impossible to determine in what particular appellant offended the law.

It is wrongful in *any* area of criminal law to deny an accused fair advance notice, both by law and by charge, of that which society prohibits by law and the particular by which he, the accused, is charged with having engaged in a violation. (*Collins v. United States,* 253 Fed. 609; *Foster v. United States,* 253 Fed. 481; *Fontana v. United States,* 262 Fed. 283.) Fair practice notice in both stated respects, and particularly by time of trial, is "the first and most universally recognized requirement of due process." (*Smith v. O'Grady,* 312 U. S. 329, 334; *Cole v. Arkansas,* 333 U. S. 196, 201; *DeJonge v. Oregon,* 299 U. S. 353, 362; *Snyder v. Massachusetts,* 291 U. S. 97, 105.) Punishment without fair statement of cause and of charge is blind and unconfined and meaningless, and serves only

to evidence and manifest absolute power, and to instill fear bred of such power. Such is the core of rule by men, not by law. All civilized, democratic societies, and certainly our constitutional one, condemns and forbids such. "Law [cannot be] mere will asserted as an act of power." (*Hurtado v. California,* 110 U. S. 516, 535.)

The above described procedure is particularly offensive here since all of this has occurred in the sensitive and crucial area of society affecting freedom of speech, press and thought—the area which is life-giving to the highest societal values of democratic self-government and the advancement of learning and the preservation of individual right and liberty. There particularly is it intolerable to suffer a statute, a prosecution and a judgment and affirmance having the features and consequences as in the cause here.

Moreover, under any view of the evidence books in Exhibits 1 and 5 or at least some of them are protected examples of the exercise of liberty of press, yet as seen above it cannot be ascertained from the statute and charge below and the Appellate Department affirmance but that the conviction rests in part or in whole upon such protected examples of free speech. This alone calls for reversal. (*Stromberg v. California,* 283 U. S. 359.)

II.

The Statute, Penal Code, Section 311, as Applied Here to the Mailing of Circulars and the Keeping of Books for Sale by Mail Is Repugnant to Article I, Section 8, Clause 7 of the United States Constitution and Unlawfully Infringes on a Sphere of Activity Reserved Exclusively to the Federal Government Respecting Which the Federal Government Has Fully Legislated, Preempting the Field.

As we previously pointed out, *supra,* page 8, appellant was in the mail order business and was convicted because he mailed circulars advertising books which were held to be obscene and because he kept those books for sale by mail. Before the Appellate Department appellant urged, on the authority of *Hines v. Davidowitz,* 312 U. S. 52, and *Commonwealth v. Nelson* (Pa.), 104 A. 2d 133, that Penal Code, section 311, as applied to the mailing of circulars and the keeping of books for sale by mail was invalid. In rejecting this argument the Appellate Department said [C. T. p. 84, lines 4-8]:

> "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute (section 311) inoperative."

On April 2, 1956 this Court affirmed the Pennsylvania Supreme Court in *Pennsylvania v. Nelson* (No. 10, Oct. Term, 1955), 24 L. W. 4165, by a 6-3 majority. The Court there held that the federal government alone has jurisdiction over sedition and that state laws in the field

have been superseded by the passage of federal legislation.

The case at bar meets the several tests of supersession set forth in the *Nelson* case.

FIRST, the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Congressional power over the mails is practically plenary (*United States Constitution*, Article I, Section 8, Clause 7; *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407; *Lewis v. Morgan*, 229 U. S. 288; *Public Clearing House v. Coyne*, 194 U. S. 494; *Ex parte Jackson*, 96 U. S. 727) and Congress has fully legislated in the field making it a crime to advertise or mail obscene matter (18 U. S. Code, secs. 1342 and 1461) and denying the use of the mails to those who have advertised or mailed obscene matter. (39 U. S. Code, secs. 225 and 259(a).) And Congress is constantly considering additional regulation in the field (H. R. Rep. No. 850, 83rd Cong., 1st Sess.; H. R. Rep. No. 1874, 82nd Cong. 2d Sess.; H. R. Rep. No. 2510, 82nd Cong., 2d Sess.) and holding hearings (Investigation of Literature Allegedly Containing Objectionable Material, H. Res. Nos. 596 and 597; 82d Cong., 2d Sess.; Hearings on Obscene and Pornographic Materials, S. Resp. 62, 84th Cong., 1st Sess.).

The conclusion is inescapable that Congress has intended to occupy the field of obscenity in the mails. "Taken as a whole, they evince a Congressional plan which makes it reasonable to determine that no room has been left for the state to supplement the federal law." (*Pennsylvania v. Nelson, supra.*) Therefore, a state obscenity law touching the mailing of obscene matter "is superseded

regardless of whether it purports to supplement the federal law." (*Pennsylvania v. Nelson, supra.*) "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (*Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604.) "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits." (*Garner v. Teamsters Union*, 346 U. S. 485.)

SECOND, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. The power of Congress over the mails is broader and more complete than over interstate commerce. This is so because the government is the creator, owner and operator of the postal system whereas it merely regulates interstate commerce. In this area federal power is practically plenary. (*Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407; *Hines v. Davidowitz*, 312 U. S. 52.) Moreover, we are dealing here with the right of government to restrict the distribution of books, a matter peculiarly within this Court's protection. Freedom of press, of course, comprehends every sort of publication which affords a vehicle of information and opinion. (*Lovell v. Griffin*, 303 U. S. 444, 450.) Such liberty is protected at every step in the process of creation, publication and circulation from the writing and imprinting of the work until it reaches the hands of the ultimate reader. As Mr. Justice Hughes

said in the *Lovell* case, *supra*, at p. 452, quoting from *Ex parte Jackson*, 96 U. S. 727:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value."

Whether or not the term obscenity is unconstitutionally vague it is certainly vague. Accordingly, it is of the utmost importance that in this field government speak with one, and not many voices. It is bad enough that federal departments disagree with one another[7] without adding the confusion of 48 states each separately declaring, what is non-mailable because obscene.

Books traveling through the mails should not change their character from obscene to non-obscene as they travel from one jurisdiction to another. In this area there must be one national standard.

> "It is no longer possible that free speech be guaranteed Federally and denied locally; under modern methods of instantaneous communication such a discrepancy makes no sense. If speech is to be free anywhere, it must be free everywhere, and a law that can be used as a spigot that allows speech to flow freely or to be checked altogether is a general threat to free opinion and enlightened solution. What is said in Pennsylvania may clarify an issue in California, and what is suppressed in California may leave us the worse in Pennsylvania. Unless a re-

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[7] "Research discloses a curious but complete confusion between the Post Office and the Customs over what constitutes obscenity. No unanimity of opinion unites these two governmental services in a common standard. Books have cleared the port only to find the mails closed to them; others printed here have circulated freely while copies were stopped at the ports."

Commonwealth v. Gordon (Pa.), 66 D & C 101.

striction on free speech be of National validity, it can no longer have any local validity whatever."

Commonwealth v. Gordon, supra.

THIRD, enforcement of the state act presents a serious danger of conflict with federal administration of the subject. Plainly, different Courts define and interpret obscenity in many different ways. This can only lead to conflict.

"A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Garner v. Teamsters Union, 346 U. S. 485, 490-491.

"Should the states be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned [in Garner v. Teamsters Union] but the added conflict engendered by different criteria of substantive offenses."

Pennsylvania v. Nelson, supra.

In the case at bar we do not merely have potential conflict. The circulars [Exs. 2 and 3] which were the basis of the conviction here under Count II were before the United States Court of Appeals for the Ninth Circuit in *Olesen v. Stanard,*[8] 227 F. 2d 785, and that Court found the circulars not to offend the federal obscenity statute. An examination of Exhibits 2 and 3 and Footnote 5, p.

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[8]Stanard is appellant's wife. Male Merchandise Mart is the name of the mail order business.

788 of the Court of Appeals opinion show the circulars to be substantially identical. The Court of Appeals there said:

> "The field of Appellee's operation within the law and within the representation of the circulars is a broad one and not every indelicacy or every suggestive matter is 'obscene, lewd, lascivious, indecent, filthy or vile . . .'"

On other occasions appellant's mail order business has also been before the federal courts (*Stanard v. Olesen,* United States District Court, Southern District, Central Division, No. 17026PH, unreported [C. T. p. 22]; *Stanard v. Olesen,* 121 Fed. Supp. 607, reversed in effect *Stanard v. Olesen,* 74 S. Ct. 768 (Mr. Justice Douglas, in chambers). In all these cases appellant's substantive position has been sustained in the federal courts.

Here we have "a multiplicity of tribunals . . . a diversity of procedures" (*Garner v. Teamsters Union, supra*) and an avowed "different criteria of substantive offense" (*Pennsylvania v. Nelson, supra*). The very court that affirmed the conviction here said in discussing the leading federal case of *United States v. One Book Entitled Ulysses,* 72 F. 2d 705:

> "We do not assent to everything said in that case which appears to have gone to the extreme of liberality in its interpretation of the statute in favor of the book."

People v. Wepplo, 78 Cal. App. 2d (Supp.) 959.

Since Congress has occupied the field to the exclusion of state legislation, and the dominant interest of the federal government precludes state intervention, and application of Penal Code, section 311, in the case at bar would conflict with federal control of the mails, the statute should be declared void as applied.

Respectfully submitted,

STANLEY FLEISHMAN,

Attorney for Appellant.

WILLIAM B. MURRISH, and
BROCK, EASTON, FLEISHMAN & RYKOFF,

Of Counsel.

APPENDIX A.

People of the State of California, Plaintiff and Respondent, v. David S. Alberts, Defendant and Appellant. Cr. A. 3350.

Appellate Department, Superior Court, Los Angeles County, California. Dec. 29, 1955.

Rehearing denied Jan. 12, 1956.

C. Richard Maddox, Beverly Hills, Stanley Fleishman, Hollywood, for appellants.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

A. L. Wirin, Los Angeles, amicus curiae.

BISHOP, Judge.

The defendant was convicted on two charges based on section 311 of the Penal Code: that he had lewdly kept for sale obscene and indecent books; and that he had lewdly written, composed, and published an advertisement of them. A new trial was denied, and a sentence (its terms not divulged) was imposed. The appeal is from the order and judgment.

Section 311, Penal Code, declares a large number of acts, if lewdly done, to be a misdemeanor. Subdivision 3 of the section alone lists some nineteen of these acts, and in the first count of the complaint it was charged that the defendant had done all of them. Whatever may be said about the possibility that one who swears to such a complaint is guilty of perjury (for there was not the slightest proof that the defendant had committed most of the acts

charged), and that a decent regard to fair play, would dictate that some attempt be made to have the charge fit the known facts, it is not legal error to charge them all in one count. See People v. McClennegen, 1925, 195 Cal. 445, 452, 234 P. 91; Bealmear v. Southern Calif. Edison Co., 1943, 22 Cal. 2d 337, 340-343, 139 P. 2d 20, 22-23; People v. Rosenbloom, 1931, 119 Cal. App. Supp. 759, 762, 2 P. 2d 228, 230; and People v. Allington, 1951, 103 Cal. App. 2d Supp. 911, 914-919, 229 P. 2d 495, 497-500.

Two other facts support our conclusion that a reversal should not be had because of the shot-gun character of pleading. The first is, that even if it were error to charge the many acts with reference to many things, with no expectation of proving but a few of them, no attack was made upon the complaint by demurrer, as may now be done. Section 1004, Penal Code. Moreover, while the type of pleading being considered lends itself to an unfair prosecution, actually, in this case, the defendant was not prejudiced; he would have been no better off had the charge been simply that he kept obscene books for sale.

The words "obscene or indecent" as used in subdivision 3 of section 311, are not unconstitutionally indefinite. As early as 1896 the United States Supreme Court knew their meaning. Swearingen v. U. S., 1896, 161 U. S. 446, 451, 16 S. Ct. 562, 40 L. Ed. 765, 766, and a large number of cases since then have been decided on the theory that their meaning was not obscure. See Annotation, 76 A. L. R. 1099, and People v. Wepplo, 1947, 78 Cal. App. 2d Supp. 959, 961, 17 P. 2d 853, 855.

To be sure, it is not always easy to decide on which side of the line a book should be placed, but if a difficulty of that sort sufficed to condemn a statute, then we could not declare it to be a crime to drive while under the influence of liquor, or to induce a person to part with his property by a false pretense, or to kill with malice aforethought.

The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares—and that some of his books were obscene we do not consider debatable—does not render the state statute, section 311, inoperative. See *In re* Phoedovius, 1918, 177 Cal. 238, 246, 170 P. 412; Zinn v. State, 1908, 88 Ark. 273, 114 S. W. 227, 228; *Ex parte* Williams, 1940, 345 Mo. 1121, 139 S. W. 2d 485, 491, which cites *In re* Phoedovius, *supra*, certiorari denied in U. S. Supreme Court, Williams v. Golden, 311 U. S. 675, 61 S. Ct. 42, 85 L. Ed. 434; Railway Mail Ass'n v. Corsi, 1945, 326 U. S. 88, 95, 65 S. Ct. 1483, 89 L. Ed. 2072, 2077.

We see no good purpose to be served by a discussion of either the evidence, which we find sufficient to support the judgment, or of the other contentions advanced.

The order and judgment appealed from are affirmed.

SHAW, *P. J.*, and SWAIN, *J.*, concur.

On Motion for Rehearing

Before BISHOP, P. J., and PATROSSO and SWAIN, JJ.

BY THE COURT.

The petition of appellant for a rehearing after judgment of this court on appeal, in the above entitled matter, having been filed, and having been duly considered,

Said petition is hereby denied.

Memorandum.

In his petition for a rehearing, the defendant reveals that he shares a misunderstanding of the duty resting upon this Department, with respect to the writing of opinions, that is so widely held that it calls for a comment. Referring to the pronounced silence in our opinion, on a proposition he had argued, the defendant stated; "a proper consideration for the parties and this Court's duty to declare the law would seem to require some comment on the question posed."

Throughout the past twenty-five years, "this court" has recognized a duty "to declare the law" in only a very limited number of cases. To begin with, the requirement of Article VI, section 24, of the State Constitution, that "all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and the grounds of the decision shall be stated" obviously does not apply to us. Moreover, Rule 6, of the rules adopted by the Judicial Council for the government of appellate departments, declares that "The judges of the Appellate Depart-

ment shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest."

We sympathize with the desire of counsel, who have earnestly argued a question, to have us explain how we arrived at an adverse answer. The number of cases that come before us is so great, however, that as a rule, we cannot gratify the understandable desire of counsel, for writing an opinion often takes more time than arriving at it. Our system of conference, before and after the call of the calendar, reduces to near the vanishing point the danger of one-man decisions, or decisions made without considering the points and authorities advanced.

Now and then a case comes before us involving a question that is little likely to be solved, at any early time, by either the Supreme Court or one of the district courts of appeal, but which will frequently reappear before the more than eighty municipal court judges whose judgments come to us on appeal. Examples readily come to mind: the unlawful detainer actions under the rent regulations; violations of a newly created offense punishable only as a misdemeanor. In this class of cases we recognize a duty "to declare the law." Even in such cases we feel under no duty to comment on every contention that may be made. We do not believe that we should follow practices that add unnecessarily to the number of law books that the profession must buy and provide shelves to house.

LIBRARY
SUPREME COURT, U.S.

DAVID [illegible]

STATE OF [illegible]

[illegible]

WILLIAM [illegible]
BROCK, EASTON, FLEISHMAN & RYHOFF,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 852.

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

Brief in Opposition to Motion to Dismiss or Affirm.

Appellee moves to dismiss the appeal or affirm the judgment below on the grounds that

(1) The appeal does not present a substantial federal question; and

(2) The judgment rests on an adequate non-federal ground.

Appellee's motion is without merit.

I.

The Appeal Presents Substantial Questions.

A. Appellant's Assertion That Penal Code Section 311, Proscribing Obscene Books, Is so Vague and Indefinite in Form and as Interpreted as to Permit Within Its Scope the Punishment of Incidents Fairly Within the Protection of the Guarantee of Free Speech and Press in Violation of the First and Fourteenth Amendments, Presents a Substantial Question.

Appellee in its motion (p. 4) argues that the question is not substantial for the reason that this Court has in effect already upheld the validity of like statutes against constitutional attack. The cases cited by appellee do not support this proposition: *Rosen v. United States* (1896), 161 U. S. 29; *United States v. Dennet* (1930), 39 F. 2d 564; *Bonica v. Oleson* (1954), 126 Fed. Supp. 398; *United States v. Limehouse* (1932), 285 U. S. 424.

While *Rosen v. United States, supra,* and *United States v. Limehouse, supra,* dealt with a federal statute relating to mailing obscene matter they did not consider in any way the constitutional questions posed by this appeal. In *United States v. Dennet, supra,* it was held that the book there involved was *not* obscene, the circuit court saying by way of dictum that there was no question as to the constitutionality of the act. In *Bonica v. Olesen, supra,* the district court held that the films there involved were not obscene. No constitutional question was decided. These cases certainly do not put to rest the important constitutional questions raised in this appeal.

In appellant's jurisdictional statement (pp. 21-22) we argued that the appeal in the instant case presents a substantial question since it raises much the same question posed in *Butler v. Michigan*, probable jurisdiction noted. In answer to appellant's argument appellee states in its motion (p. 11):

> "There is no merit to appellant's contention. There is nothing in the Wepplo case, *supra*, or in any other California cases cited, that can be fairly construed as holding that:
>
> "'The Michigan and California statutes, as interpreted are strikingly similar.' [Jur. Stat. p. 21.]"

Appellee has failed to grasp appellant's reference to *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 59. The *Wepplo* case, *supra*, was cited to show that the California statute as interpreted *was* strikingly similar to the Michigan statute under consideration in *Butler v. Michigan*, *supra*.

California Penal Code, Section 311(3) as interpreted by *People v. Wepplo*, *supra*, reads:

> "Every person who . . . keeps for sale . . . any obscene or indecent . . . book . . . which has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desires is guilty of a misdemeanor."

The Michigan statute (M. S. A. 28.575) provides:

> "Any person who shall . . . possess with the intent to sell . . . any book . . . containing obscene, immoral, lewd or lascivious language . . . manifestly tending to the corruption of the morals of youth is guilty of a misdemeanor."

It is perfectly plain, whether a California case has so stated or not, that the Michigan and California statutes as interpreted are similar, and present in part the same important constitutional questions.

B. Appellant's Assertion That He Was Convicted Because He Mailed Circulars Advertising Books Which Were Held to be Obscene and Because He Kept Those Books for Sale by Mail Presents a Substantial Question.

As we have shown (Jurisdictional Statement pp. 8, 25), the statute *as applied* reached and punished activities which were part and parcel of a mail order business. Appellee seems to argue that because the State statute does not on its face mention mailing, it does not infringe upon a federal power (appellee's motion pp. 15 to 17). The law is otherwise. In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 82, the Court held that a purchase in Kentucky for transportation to Tennessee was interstate commerce and that the state law which would validly apply to intrastate commerce was unconstitutional as applied to interstate commerce. This Court there said that interstate commerce is not confined to transportation from one state to another but "comprehends all commercial intercourse between different states and *all the component parts of that intercourse.*" (Emphasis added.)

It is plain that keeping books for mailing constitutes using the mails just as buying locally for transportation to another state constitutes interstate commerce. See also *Leisy v. Hardin*, 135 U. S. 100; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148.

II.

The Judgment Rests on Federal Grounds.

In its motion (p. 18) appellee suggests that the judgment "might" have rested upon a non-federal ground. What this non-federal ground "might" be is not disclosed. The Appellate Department considered appellant's argument that the statute on its face and as applied violated the federal constitution, and held against appellant saying:

> "The words 'obscene or indecent' as used in subdivision 3 of section 311, are not unconstitutionally indefinite. As early as 1896 the United States Supreme Court knew their meaning. Swearingen v. U. S., 1896, 161 U. S. 446, 451, 16 S. Ct. 562, 40 L. Ed. 765, 766, and a large number of cases since then have been decided on the theory that their meaning was not obscure. See Annotation, 76 A. L. R. 1099, and People v. Wepplo, 1947, 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853, 855. To be sure, it is not always easy to decide on which side of the line a book should be placed, . . ." (Jurisdictional Statement, Appendix A, pp. 2-3.)

Likewise the Appellate Department considered and ruled against appellant's argument that since he was convicted for using the mails the state law was superseded by applicable federal law:

> "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute, section 311, inoperative. See in re Phoedovius, 1918, 177 Cal. 238, 246, 170 P. 412; Zinn v. State, 1908, 88 Ark. 273, 114 S. W. 227, 228; *Ex parte* Williams, 1940, 345 Mo. 1121, 139 S. W. 2d

485, 491, which cites In re Phoedovius, *supra*, certiorari denied in U. S. Supreme Court, Williams v. Golden, 311 U. S. 675, 61 S. Ct. 42, 85 L. Ed. 434; Railway Mail Assn. v. Corsi, 1945, 326 U. S. 88, 95, 65 S. Ct. 1483, 89 L. Ed. 2072, 2077." (Jurisdictional Statement, Appendix A, p. 3.)

The law is plain that if the state court bases its decision upon a determination of a federal question, the argument will not be heard, in an attempt to defeat the jurisdiction of this Court, that the state court *might* have based its decision upon an independent and adequate non-federal ground (*Grayson v. Harris*, 267 U. S. 352, 358; *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, 16-17; *International Steel and Iron Co. v. National Surety Co.*, 297 U. S. 657, 666; *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 98; *Steele v. Louisville and N. R. Co.*, 323 U. S. 192, 197, n. 1).

The foregoing answers the points raised in appellee's motion. Our jurisdictional statement shows that important federal constitutional questions were raised and decided adversely to appellant by the state court and that controlling cases of this Court strongly suggest that the state court was in error. Further argument properly awaits hearing on the merits. Appellee's motion to dismiss or affirm should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

FURTHER MEMORANDUM SUBMITTED BY LEAVE OF COURT.

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STATE OF CALIFORNIA,

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FURTHER MEMORANDUM SUBMITTED BY LEAVE OF COURT.

On December 3, 1956, this Court, by order, granted appellant leave to file a further memorandum in the above-entitled cause. 25 L. W. 3168.

The circumstances which led to the granting of the aforesaid order were briefly as follows: On October 16, 1956, this Court heard argument in *Butler v. Michigan*, No. 16, October Term, 1956. A summary of the argument was thereafter published on October 23, 1956. 25 L. W. 3117-3118. It appeared from the aforesaid summary that this Court was concerned with the constitutional validity of a state criminal statute which punished the sale of "obscene" books. This is an issue

which has never been definitely decided by this Court,* but which is now particularly raised in the cause herein.

In the *Butler* argument, questions were raised by members of this Court as to whether the term "obscene" was a sufficient criterion of guilt within the due process and free speech requirements of the Constitution of the United States. Counsel in *Butler* appeared to think that it was, agreeing that "'obscene' satisfies the Winters case." Counsel stated that the best constitutional test which counsel could arrive at for the term "obscene" was "dirt for dirt's sake" (as opposed, apparently, to "art for art's sake"). In reply to an inquiry as to why "obscene" was less vague than "immoral," counsel replied: "I think people deal with earthy things and over years of experience get what is permissible through experience." It was apparently upon the basis of the aforesaid reasoning that counsel agreed that "obscene" may be "a satisfactory test even though it is not as precise as an algebraic equation." 25 L. W. 3117-3118.

Following the argument in *Butler*, appellant here moved for leave to intervene in the said cause, or, in the alternative, for consolidation of the cause herein with *Butler*. Appellant urged that the aforesaid position taken in

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*"Yet I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity which, up to now, I think the Supreme Court has not discussed in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation." *United States v. Roth* (C. A. 2), unreported, Frank, J., concurring, cert. pend. No. 582.

Butler was directly contrary to the position taken by appellant in the instant proceeding; that appellant contended here that the term "obscene" was unconstitutionally vague and unconfined and a censorial proscription of ideas and speech in violation of the First and Fourteenth Amendments to the Constitution; that one of appellant's principal issues in the instant cause would be seriously adversely affected if, without adversary presentation or argument, this Court should determine that "obscene" is a constitutionally satisfactory standard; that since appellant Butler did not take the position that "obscene" is unconstitutionally vague, and since this is a question of great importance transcending in law and reach the interests of the parties in *Butler*, and since a correct determination of the issue is vital to the appellant in the cause herein, the appellant should be afforded the relief sought. The motion for leave to intervene, or to consolidate, was denied with "leave to file a further memorandum in No. 61." 25 L. W. 3168.

Statement.

California makes it a punishable offense for any person to write, compose, publish, sell, keep for sale or distribute *any book* which is "obscene or indecent." Cal. Pen. Code, Sec. 311, subd. 3. It is also made a crime to advertise such "obscene or indecent" book. Cal. Pen. Code, Sec. 311, subd. 4. California construes the statute as meaning that a book is "obscene or indecent" if the book "has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

People v. Wepplo, 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853.* Under the statute as thus construed, appellant has been convicted of keeping for sale by mail and for advertising by mail "obscene and indecent" books. Precisely which of the books, so advertised and sold by appellant, come within the law's interdiction in this case, the State has failed to indicate. [J. S. pp. 6-8.]**

On this phase of his appeal, appellant has invoked the jurisdiction of this Court on three broad grounds of constitutional importance, raising fundamental questions which have not heretofore been decided by this Court. These contentions may be summarized as follows: (1) The statute on its face, and as construed, deprives appellant of his liberty and property without procedural due process of law because its language is so vague and indefinite as to fail to give notice of required conduct to those who would avoid the penalties of the statute, and to guide a judge and jury in the application of the statute; (2) The statute on its face, and as construed, deprives appellant of his liberty and property without substantive due process of law in that the statutory language is so broad and sweeping that the sanctions of the statute may be applied, and have been applied herein, to opinions,

---

*The State makes no distinction in the class of readers of the books,—age, profession, or otherwise. If the books are in fact "obscene", judged by their "contents", then, according to the State, the books are not any less "obscene" because literary critics praised the books as works "of literary merit" or because the "public library" had copies of them. The question whether any particular book is "obscene" or "indecent" is, according to the State, primarily one of "fact", to be decided by the jury. *People v. Wepplo, supra,* pp. 961-2.

**The reference "J. S." is to appellant's Jurisdictional Statement on file herein.

beliefs and conduct within the protection of the First Amendment; (3) The statute on its face, and as construed, is a punitive censorship law abridging speech, press, opinions and beliefs which the State is without power to enact under the First and Fourteenth Amendments to the Constitution. In all the aforesaid respects, appellant claims that the statute on its face, and as construed, deprives appellant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

This memorandum is intended solely to outline some of the weighty factors which must be considered in determining the constitutional issues here involved. No attempt has been made to present a detailed analysis of the questions involved which only a definitive brief and oral argument can present after acceptance of jurisdiction of the cause by this Court. The object of this memorandum is to make it clear that the constitutional issues here involved are so important and run so deep that this Court should not attempt their solution without benefit of full adversary presentation and argument. The fundamental question here raised was avoided by appellant in *Butler* with counsel's concession that the term "obscene" in a criminal statute was sufficient to meet the criterion of guilt necessitated by the due process and free speech requirements of the Constitution of the United States. The position of the appellant here is directly to the contrary, as his Jurisdictional Statement indicates, and it is to a consideration of the broader issues which arise from appellant's position here that this memorandum is directed.

I.

The Statute, on Its Face and as Construed, Is Void Because so Vague as to Offend Procedural Due Process of Law and to Violate Freedom of Speech and Press.

It has, of course, been settled by this Court that where the language of a State statute is so obscure that it fails to give adequate warning to those subject to its prohibitions as well as to provide proper standards for adjudication, the statute cannot stand consistent with the due process requirements of the Constitution. The statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties; must be definite enough to guide the judge and jury in the application of the statute and the attorney defending the accused charged with a violation of the law. *International Harvester Co. v. Kentucky*, 234 U. S. 216; *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Champlin Refining Co. v. Commission*, 286 U. S. 210; *Lanzetta v. New Jersey*, 306 U. S. 451. See also, *United States v. Cohen Grocery Co.*, 255 U. S. 81.

A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, "violates the first essential of due process of law." *Connally v. General Construction Co.*, *supra*, p. 391. "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U. S. 174, 176. Moreover, not only is statutory certainty an essential element of due process, but without it an accused is deprived of

any information as to the nature and cause of the accusation made against him in the particular case. The confluence of the basic principles of the Fifth and Sixth Amendments are thus subsumed into the due process provisions of the Fourteenth Amendment. *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458. Finally, it is submitted that a conviction under a concededly vague criminal statute is an adjudication outside "the law," not under it. It is impossible to adjudicate where statutory terms are indefinite, vague and obscure. There is in such case no way of knowing of what an accused was convicted, and no appropriate basis exists for appellate review. In such cases, judges and juries are not determining whether an accused has come near to or crossed "the line" fixed by the law; a concededly vague statute fixes no line and judges and juries are simply legislating retrospectively whether or not the accused by his conduct has committed a "crime" in the peculiar estimation of the judge and jury. When the real issue submitted to a jury is "legislative, not judicial," a violation of the Fourteenth Amendment occurs. *Cline v. Frink Dairy Co.*, 274 U. S. 445, 457.

Moreover, all of the foregoing is especially true and compelling within the domain of law affecting liberty of thought and expression. The vice of a vague law is multiplied many times when it seeks to interdict not merely conduct but freedom of expression, thought and belief. These are the very life arteries of democratic society and government, and if they are severed or destroyed there is grave injury to the whole process of free living. Vagueness in laws punishing the distribution of books—the written word—is particularly damaging to

society. Chief Justice Marshall expressed this thought in a letter to Talleyrand:

> "The genius of the constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America." The Life of John Marshall, Albert J. Beveridge, Vol. II, pp. 329-30.

In the foregoing premises is the law in the instant case sufficiently definite and clear to meet the commands of procedural due process and to respect the guarantees and requirements of free speech and press? Are persons reasonably informed as to what the state commands or forbids? It is submitted that upon analysis the statute at bar proscribing "obscenity" cannot meet the constitutional tests.

A. The Dictionary Affords No Ascertainable Standard of Guilt.

The key words in the statute are the words "obscene" and "indecent." Indeed, these are the only two terms which fix the standard applicable to interdicted books. What is an "obscene" book? What is an "indecent" book? The dictionary makes the following answer:

> "Obscene: 1. Offensive to taste; foul; loathsome; disgusting. 2. Offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be exposed; lewd; indecent; as, *obscene* language, dances, images."
>
> * * * * * * * *
>
> "Indecent: Not decent; specif; unbecoming or unseemly; indecorous; as, *indecent* haste—morally unfit to be seen or heard; offensive to modesty and delicacy; as *indecent* language.
>
> Syn. Immodest; impure; gross, obscene. See improper."
>
> Webster's *New International Dictionary* (2nd Ed. unabridged).

It is doubtful that any serious contention can be made that such dictionary definitions make clear what was obscure before. "The multiplication of adjectives is often a sign of uneasiness." Ernst and Seagle, *To The Pure . . . A Study of Obscenity and the Censor* (N. Y., 1928), p. 191. It confounds the vice of vagueness to define "obscene" as something "offensive to taste," or as some presentation to the mind "that delicacy, purity and decency forbid to be exposed." To say that a book is "indecent" when it is "morally unfit to be seen or heard" is about as clear—and about as profound—as to

say that "virtue is its own reward" or "business is business." "Bad books . . . are books which have a bad effect." *The Impact of Literature: A Psychological Discussion of Some Assumptions of the Censorship Debate* (1954) by Dr. Jahoda and Associates, p. 8. Such definitions are no more than "square blocks" where all sides are equal and parallel.

California has not been unaware that the statute on its face is but a trap for the unwary. It has therefore attempted to aid the statutory premises by giving notice to all those who write, sell, or keep books for sale that the words "obscene" and "indecent" have a particular meaning purportedly less elusive than the statutory words would appear to have. A book is "obscene" only if it has a substantial tendency to "deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire." We put to one side at this point the question as to what constitutes a "substantial tendency" within the intendment of the law, or what is meant by the words "deprave or corrupt." We examine the key phrases in the statute: —"lascivious thoughts and lustful desire"—for it should be noted that the book will be proscribed only if it corrupts and depraves its readers by inciting these "thoughts" and "desire."

All that remains now is to "take the dictionary down from the shelf" and find the answers.

> "*Lascivious:* 1. Wanton; lewd; lustful. 2. Tending to produce voluptuous or lewd emotions.
>
> Syn.—Licentious, lecherous, libidinous, salacious.*

* * * * * * * *

*The dictionary gives an example of the use of the word: "The lascivious pleasing of a lute. Shak."

> *"Lustful:* 1. Full of, or excited by lust; as, a lustful man; characterized by lust; provocative of lust. 2. Strong; lusty.
>
> Syn.—Lecherous.
>
> *"Lust:* Sensuous desire; bodily appetite; specif. and most commonly, sexual desire, as a violent or degrading passion. Longing or intense desire; eagerness to enjoy."
>
> Webster's *New International Dictionary* (2nd Ed., unabridged).

It is obvious that all attempts to resort to dictionary definitions are fruitless. A "lascivious thought" or "wanton thought" or "voluptuous thought" are the same abstractions. It would appear that a "lustful desire" may be a "sexual desire, as a violent or degrading passion," but a specific description of this form of emotion might baffle even a Freud or a Kinsey.

We have not exhausted all the lexicographers, modern and ancient. See, Scott, G. R., *Into Whose Hands* (Lord, 1945), pp. 24-25. They will be found upon inspection to present the same tautological references. It is impossible to determine from the dictionary what is and what is not "obscene" or "indecent" in literature and art, or what is or what is not a "lascivious thought" or "lustful desire" which some book will have a "substantial tendency" to awaken in a reader to the point of "corrupting and depraving" him. The words have as many meanings as there are languages, countries, communities, localities, mentalities, conceptions and temperaments.

B. The Judicial Precedents Offer No Ascertainable Standard of Guilt.

If there is any unifying theme which runs through the "obscenity" decisions, it is this: The courts have been unable to provide a definition of the "crime." Coupled with this confession of failure has come conviction by guesswork on the part of both judge and jury. Since conceptions of "obscenity," "indecency," "lust" and "lasciviousness" depend not on reason but emotion, the reactions of each individual to the contents of a book are influenced not only by the customs or reactions of society, but by geography, environment, by fashion, by a person's own psychological, physical and mental makeup, by his own religious, educational, family and group relationships—social, economic and political. It is for these reasons that a book adjudged "obscene" in one country is ranked as a "classic" in another; that what was "obscene" yesterday is allowed free circulation today; that what one judge or jury condemns, another approves—and this, sometimes in the same community and at the same time. [J. S. pp. 15-19.] See, Schroeder, T., *"Obscene" Literature and Constitutional Law* (N. Y., 1911); Ernst and Seagle, *To the Pure . . . . A Study of Obscenity and the Censor* (N. Y., 1928); Scott, G. R., *"Into Whose Hands," An Examination of Obscene Libel in its Legal, Sociological and Literary Aspects* (Lord, 1945); Craig, A., *The Banned Books of England* (Lord, 1937); Haight, A. L., *Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places* (N. Y., 1955).

No rule of *law* can be distilled from the judicial precedents. Definitions of such terms as "obscene" and "indecent" remain as unintelligible after a reading of the

precedents as before. To a large extent, these decisions appear to reflect no judgments under rules of law, but the varying personal prejudices of different men with differing "moral" and "aesthetic" backgrounds. "Not any of these laws define 'obscenity' or say what it is in literature, or prescribe any test to identify it in literature. That vests the court with an over-all control, or, as some say, censorship of 'obscene' literature . . . the courts have gone on through the years construing and interpreting the inhibitory words of these statutes generally to agree with their own ideas of what was or was not 'obscenity' . . . How is this test to be applied? How is a court or jury to know if on reading a literary work sex ideas arise in the minds of the readers and, if so, whether they are pure or impure for according to this test, it is only lustful or impure sex ideas with which courts and juries are concerned." *State v. Lerner*, 81 N. E. 2d 282, 285-286 (Ohio).

Other courts have also acknowledged the elusiveness of the problem. Thus: "The exact point at which language becomes obscene or filthy cannot be determined by any standard test, but it is rather a matter of opinion to be ascertained by the use of ordinary common sense and reason, taking into account the circumstances in which the matter is employed." *Comm. v. Donaducy*, 167 Pa. Sup. 611, 613, 76 A. 2d 440. "Comprehensive and complete as are these tests, their application in a given case is by no means easy. Indeed it is not indulging in hyperbole to say that no more difficult or delicate task confronts a court than that arising out of the interpretation and application of statutes of this sort. . . . Our attention has been directed to two decisions in other jurisdictions in which the book in question has been held not

to be obscene under statutes somewhat similar to ours. . . . A discussion of these decisions would not be profitable.'" *Attorney General v. The Book Named "God's Little Acre,"* 326 Mass. 281, 283, 285, 93 N. E. 2d 819. "The definitions all lead to the dead-end of a subjective determination." *Bantam Books, Inc. v. Melko,* 25 N. J. Sup. 292, 307, 96 A. 2d 47. "The most cursory survey reveals that despite the extensive consideration which the courts have given it, the concept of obscenity remains elusive. . . . The general course of decisions indicates that the work in question is approached as an aggregate of different effects, and the determination turns on whether the salacious aspects are so objectionable as to outweigh whatever affirmative values the book may possess." *American Civil Liberties Union v. Chicago,* 3 Ill. 2d 334, 343, 346, 121 N. E. 2d 585. "That statutes concerning obscenity are usually broadly worded so as to cover all possible methods of bringing the attention of decent persons to obscene papers, pictures, or articles. . . . The word 'obscene' not being a technical term of the law, and not being susceptible of exact definition in its judicial or legal use, this question must in any given case be submitted to the jury as a question of fact and the finding of the court, sitting as a jury, as in the instant case, may not be disturbed if that finding is sustained by testimony sufficient to support that conclusion by an ordinary man of average intelligence." *Hadley v. State,* 205 Ark. 1027, 1030, 172 S. W. 2d 237. "The criterion of decency is fixed by time, place, geography and all the elements that make for a constantly changing world . . . the test that the book is required to meet is the measure of public opinion in the City of New York in the year 1935 . . . the task of the judge is to record the tides

of public opinion. . . . . My duty is to act as an observer and recorder—not as regulator." *People v. Miller*, 155 Misc. 446, 447, 279 N. Y. Supp. 583.

Although many state courts, including California, do not adopt the more "liberal" tests formulated by Judges Hand and Woolsey in the federal courts, it may be pertinent to inquire here whether the so-called "Hand rule" provides any more definite standard by which an author or bookseller can determine whether the contents of a book are "obscene" or "indecent", or will tend to incite "lascivious thoughts" or "lustful desire" in their readers. It must always be remembered, it is respectfully submitted, that the issue here is plainly not one of literary criticism. An author can suffer "a fate worse than death" from a review in the literary section of the New York Times as well as from a judge or jury. We are dealing here with the punishment of "crime" under the law, the fixing of the stigma of criminality upon persons in accordance with principles and standards embedded in a Constitution which itself reflects the historical will of an entire nation. In *United States v. Kennerley*, 209 Fed. 119, 121 (D. C. N. Y., 1913), Judge Hand stated: "If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now. If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence." Judge Hand returned to this same theme in *United States v. Levine*, 83 F. 2d 156, 157 (C. A. 2, 1936): "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a

syllogism of which they are to find only the minor premises, but really a small bit of legislation *ad hoc*, like the standard of care." Judge Hand conceded that such determinations are usually the result of "the personal aberrations of the jurors", but he thought that the most one could do to avoid such subjective reasoning was to give the jury a series of "cautions"—if the book were old, its accepted place in the arts must be regarded; if new, the opinions of competent critics must be considered; the effect upon "all" whom it is likely to reach must be decided, not the effect upon any "particular class."

It was soon evident that these views could not clarify that which was intrinsically vague. In *Parmelee v. United States*, 113 F. 2d 729, 732 (C. A. D. C., 1940), the court thought that the "critical point" test enunciated by Judge Hand was perhaps "the most useful definition", but it stated: "But when we attempt to locate that critical point in the situation of the present case, we find nothing in the record to guide us except the book itself." Actually, the concept that within the area of speech and thought specification of what is permissible may be relegated—avowedly and by open concession—to "legislation *ad hoc*" by juries or trial courts after the fact is particularly violative of the most basic fundamentals of liberty of thought and speech once it is openly expressed. To countenance such is to countenance avowedly total and arbitrary power of regulation over speech and thought by punitive bodies of the state—censorship power in uttermost conceivable measure. Judge Frank has always been critical of Judge Hand's concept and formulation. In *Roth v. Goldman*, 172 F. 2d 788 (C. A. 2, 1949), Judge Frank stated that he had his "doubts" about the equipment of a jury to determine the "social sense of what is right" at "any given

time." "For any particular single jury may not at all represent the 'average' views of the community, especially on such a subject." *supra*, p. 795, n. 30. Only recently Judge Frank, in a provocative and learned opinion, again expressed his dissatisfaction with a standard of "the average conscience of the time." *United States v. Roth*, unreported (C. A. 2, 1956), cert. pend. No. 582, Oct. Term 1956. In *Walker v. Popenoe*, 149 F. 2d 511, 513 (C. A. D. C., 1945), Judge Edgerton questioned whether the legislature could constitutionally confine discussion of sex within the limits which it conceives "to be good for the community." Judge Bok in *Commonwealth v. Gordon*, 66 D. & C. 101 (1949) rejected the notion that anyone can tell instinctively what is or is not obscene. "The idea that instinct can be resorted to as a process of moral *stare decisis* reduces to absurdity." (p. 116). Rejecting the notion of an "aggregate sense of the community", the learned Court suggested his own notion of the social sense of the community. "I believe that the consensus of preference today is for disclosure and not stealth, for frankness and not hypocrisy, and for public and not secret distribution. That in itself is a moral code." (p. 118). But whether "the community" believes in frankness or hypocrisy is beside the point because in the area of thought and desire, majority rule simply does not apply. This is as true of sexual thought and desire as it is of political and religious thought and desire.

In the light of all the aforesaid, it would appear that reliance in the law upon the general notions of persons in the community as to what is "indecent" or "obscene", as a criterion of guilt, is unacceptable and fruitless.

The suggestion by Judge Hand that juries in "obscenity" trials inevitably engage in fact in a "small bit of legislation *ad hoc*" is supported by an examination of the cases.

It would be futile to deny that what happens in such cases is that judge and jury enact crimes *ex post facto*. There is simply no way of knowing whether a book is "obscene" or "indecent" until a jury of twelve persons declare that it is "obscene and indecent". It is difficult to believe that Judge Hand would hold that, consistent with due process of law under the Fourteenth Amendment, a jury may be permitted to abandon its fact-finding function and engage in legislation in a criminal trial. Clearly, this Court held otherwise in *Cline v. Frink Dairy*. The reference to "standard of care" and "negligence" makes it more likely, however, that Judge Hand is equating prosecutions under laws which expose a citizen to conviction for indeterminate crimes with prosecutions under "obscenity" laws.

There are, of course, laws against disorderly conduct, breach of the peace, reckless driving, general drunkenness, etc. But the equation of such laws with laws punishing the sale of "obscene" or "indecent" books which incite to "lascivious thoughts" or "lustful desire" is fallacious. Regulating drunkenness and its likes is not akin at all to regulating literature and freedom of expression. Such matters are as poles. The value-premises of society differ as to such *totally*. What applies to the one will not as such apply to the other by any token whatsoever. In regulating such things as drunkenness, breach of peace, negligence or disorderly conduct, the values of society are largely one-sided, and an error or two in drawing too constrictive a line is a mishap of relatively small consequence. But it is otherwise entirely when it comes to misdrawing the line as to liberty of speech and expression. Misdraw or inaccurately draw the line there and society can condemn—and in history has condemned—not unimportant matters but the works and words of genius, the fruits

of mind such as Keats, Shelley, Rabelais, Swift, Pepys, Milton and Defoe.

Moreover, there are objective factors in judging such subjects as negligence, drunkenness, breach of peace and disorderly conduct which can be taken as guides; there are only subjective factors in judging literature for "obscenity", constantly shifting and variable. This fundamental distinction has been uniformly noted by jurists as well as the text writers in this area.

> "But in the first place, however uncertain are such laws as we have mentioned, there are always some objective factors which may be taken as guides. There is in a drunkenness arrest the prisoner's breath and the unsteadiness of his limbs, which may be observed from contact with him. When he is accused of reckless driving, it is possible to inquire into the turns of the road, the condition of the weather and the amount of traffic."
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> Ernst and Seagle, *To the Pure . . . A Study of Obscenity and the Censor* (N. Y., 1928), p. 209.

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> "It has been pointed out elsewhere that the meaning of terms fundamental in the law of property, of words like 'murder', 'arson' and 'mayhem' in the law of crimes, and even of 'negligence' have remained relatively constant. Not so with 'obscenity' or 'obscene', whose meaning has undergone changes, particularly in recent decades. In making a broad and all-inclusive definition of 'obscene', censor and judge alike, are to employ the language in *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952), 'set adrift upon a boundless sea amid a myriad of conflicting currents . . .', with

no charts but those provided by the most vocal and powerful . . ."

Bantam Books, Inc. v. Melko, 25 N. J. Sup. 292, 307, 96 A. 2d 47.

"One can say what constitutes murder, or robbery, and anyone is well aware, before he commits the crime, exactly what it is and what it implies. One cannot say what constitutes an 'obscene libel' *until it has been perpetrated and judged to be an obscenity by another party*. . . . In other words, because of the impossibility of defining what constitutes obscenity, often *the judge creates the crime which he elects to judge.*".

Scott, G. R., *Into Whose Hands* (Lord, 1945), p. 26. (Italics author's.)

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"The inherent evil of murder is apparent, but by what apparent, inherent standard of evil is obscenity to be judged, from book to book?"

Judge Bok in *Commonwealth v. Gordon*, 66 D. & C. 101, 117.

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"The word 'obscene', like such words as delicate, ugly, lovable, hateful, etc., is an abstraction not based upon a reasoned, nor sense-perceived, likeness between objectives, but the selection or classification under it is made, on the basis of similarity in the emotions aroused, by an infinite variety of images; and every classification thus made, in turn, depends in each person upon his fears, his hopes, his prior experience, suggestions, education, and the degree of neuro-sexual or psycho-sexual health. . . . It follows that to each person the 'test', of criminality, which should be a general standard of judgment, unavoid-

ably becomes a personal and particular standard, differing in all persons according to those varying experiences which they read into the judicial 'test'."

Schroeder, T., *"Obscene" Literature and Constitutional Law* (N. Y., 1911), pp. 277-8.

It would appear, therefore, that it is impossible to cull from the plethora of precedents a uniform judgment as to the meaning of such terms as "obscene" or "indecent". The complexity of the problem is only deepened by the attempts to control the "personal aberrations" of the jurors. There is no logic in urging that a "classic" will not arouse a "lascivious thought" while a poorly written book will. The opposite may be the case. All that can be said is that some courts are endeavoring to save a portion of our art and literature from the vagaries of an "obscenity" statute. Literary critics are not always agreed on what is "art" and what is "dirt"; for the instances are legion when "dirt" has come to be hailed as "art". To substitute the effect on "all persons" for the effect on "any" person means either dubious reliance on opinion polls or reliance on the "normal" man, a man who in the ephemeral area of "sexual purity" even a Diogenes would be hard put to find.*

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*In an early case, an accused was charged with committing an act injurious to "public morals" by leaving his wife and children without support. The court stated: "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The Constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed." *Ex parte Jackson*, 45 Ark. 158, 164 (1885).

C. The Historical Precedents Offer No Ascertainable Standard of Guilt.

Reliance upon the "common law" or general history in an effort to determine the meaning of "obscenity" appears misplaced. What can be drawn from an examination of the past in the area of "obscenity" is merely the absence of any valid standards, the lack of logic and consistency in the censorship of art and literature. Indeed, the concept of "obscenity" appears to be of comparatively modern growth.

1. Prior to the eighteenth century, writings which at a later date might well have been considered "obscene", were freely circulated. Shakespeare is only one example. Up until the eighteenth century, the chief concern of the Church and State were writings marked by "impiety" and "treason". The early common law apparently did not treat literature as "obscene" unless the writings in content threatened the established religion or the established State. In 1708, the first case of an "obscene libel" appears, but Lord Holt stated: "A crime that shakes religion, as profaneness on the state, etc. is indictable; but writing an obscene book, as that entitled 'Fifteen Plagues of a Maidenhead' is not indictable, but punishable only in the spiritual court." *Regina v. Read,* 11 Mod. 143, 205 (Q. B. 1708).

The only other cases in the eighteenth century are *Rex v. Curl,* 2 Strange 789 (K. B. 1727) and *Rex v. Wilkes,* 4 Burr. 2527 (K. B. 1770). In the *Curl* case, the court sustained the indictment upon the ground that religion was part of the common law. The *Wilkes* case appears to have been politically inspired. Wilkes allegedly published a poem described by his opponents as an "obscene, impious libel." "It may be summarized with safety that,

up to this point, obscenity in literature had not been the concern of the courts; it is offenses against religion which have comprised the issues. . . . There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it." Alpert, L. M., *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 44, 47 (1938). See also, Schroeder, *"Obscene" Literature and Constitutional Law* (N. Y., 1911), Ch. III, pp. 33-41.

At the time, therefore, when America separated from the mother country there seems little warrant for asserting that "obscenity" was "well known and understood in the common law."

2. Were there any basis for asserting that a common law existed in England concerning "obscenity" prior to the founding of this country, it appears clear that such common law would not have been accepted by the forefathers. In the first place, "for us to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press'." *Bridges v. California*, 314 U. S. 252, 264. There is clearly a reflection of the spirit of the times in Jefferson's statement that "some degree of abuse is inseparable from the proper use of anything. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding to proper fruits." *Jefferson's Works*, Vol. 4, p. 544.

In the second place, the founding fathers appear to have had a lusty view of life, and concern over "sexual purity" did not appear to be of pressing importance. See

the opinions of Judge Frank in *Roth v. Goldman*, 172 F. 2d 788 (C. A. 2, 1949) and *United States v. Roth*, unreported (C. A. 2, 1956), cert. pend. No. 582, October Term, 1956. See also, Judge Bok in *Commonwealth v. Gordon*, 66 D. & C. 101, 120 (1949). Monesquieu, whose writings markedly influenced the thinking of the early colonists (See, Elliott's *Debates in the State Conventions on the Adoption of the Constitution*), stated in *The Spirit of Laws* that when "manners and customs are to be changed, it ought not to be done by laws". Book XIX, Ch. XIV. Edward Livingston, engaged in a revision of the Penal Code of Louisiana, decided to omit altogether that whole class of offenses designated as *contra bonos mores*, "leaving the whole class of indecencies to the correction of public opinion". He found himself unable "to decently accuse and try a man for indecency". From the difficulty of defining the offense, Livingston held that "a fanatic judge, with a like-minded jury, will bring every harmless levity under the lash of the law". Hunt, C. H. *Life of Edward Livingston* (N. Y., 1864), pp. 289-91.

3. The genesis of the modern American "obscenity" statutes is therefore not to be found in the "majestic common law" nor in the stirring history of the founding of the Republic. In their origin, these laws were the product of the rise of "Victorianism" in the middle nineteenth century in England, and shortly thereafter imported into this country largely through the efforts of one Anthony Comstock, who "obtained or inspired passage of obscenity laws throughout the country." Judge Goldmann in *Bantam Books, Inc. v. Melko*, 25 N. J. Supp. 292, 311, 96 A. 2d 47. With such inauspicious beginning, it may be doubted, it is respectfully submitted, that the

modern "obscenity" statutes should be afforded the veneration which old age sometimes receives. Moreover, "Victorianism" and "Puritanism" have their own political, social and economic explanations. G. Rattray Taylor, *Sex in History* (Lond. 1954), pp. 205-224.

In a consideration of the history of these movements from about the 1850's to the present time and their grotesque attacks upon art and literature, it is doubtful that the term "obscene" gets precision because "people deal with earthy things and over years of experience get what is permissible through experience". The list of works banned during the last hundred years in accordance with the principles of "Comstockery" would, in many cases, read "like civilization's honor roll"—and why these works were banned, and others were not, remains a mystery. Ernst & Lindley, *The Censor Marches On* (N. Y., 1940), p. 228.

It was not then until 1857 that the progenitor of the modern "obscenity" statutes came into being. Lord Campbell's Act (20 and 21 Vict.) was intended as a protection solely for children against "pornographic" books, pamphlets and pictures. The debates in the House of Commons were sharp, with the author of the bill unable to define any "obscene" writing other than that "calculated to shock the common feelings of decency in any well regulated mind". Opponents of the bill argued that the indefiniteness of the statute would lead to perversions of its limited purpose, and ten years later this proved true when the statute was invoked in *Regina v. Hicklin*, L. R. 3 Q. B. 360. (1868). Alpert, L. M., *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938); Ernst and Seagle, *To the Pure* (N. Y., 1928), Ch. VI—; *Bantam Books, Inc. v. Melko*, 25 N. J. Sup. 292, 309-311, 96 A. 2d 47.

Lord Chief Justice Cockburn in *Hicklin* considered the anti-religious tract there involved as dangerous to growing sons and daughters. He announced his test for "obscenity" (contrary to Lord Campbell's purpose) as whether "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". Shortly thereafter, the decision was embraced by the American courts—and by the Vice Societies—and permeated the rulings of the courts until the more recent efforts to alleviate the harshness of the rule. As we have pointed out above, the *Hicklin* rule, as well as all of its different variations, remain in essence a mishmash of ponderous generalities, indefinite and incomprehensible, with an author, publisher or bookdealer subject constantly to the mere whim, bias or mercy of court and jury. Alpert, L. M., *supra*, p. 70.

In addition, on this phase of the discussion—the relation of history to the question of vagueness in this "obscenity" statute—some corollary considerations merit attention. Problems relating to the significance of the First Amendment in our constitutional system did not seriously arise to confront this Court until the 1920's when espionage prosecutions were instituted during World War I. It was not until 1925 in *Gitlow v. New York*, 268 U. S. 652, 666, that this Court expressed the view that freedom of speech and of the press were among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment. Since that time, this Court has never failed to indicate the vital necessity for representative government in the freest expression of opinions, beliefs and ideas. Therein, this Court has stated, lies the security of the Republic. In *Burstyn, Superior*

Films and *Holmby* this Court made clear, at least, that fundamental freedoms cannot depend on the unfettered decisions of men governed only by a vague and ambiguous law. The terms "sacriligious", "immoral" and "obscene" have not met the constitutional test in the areas of "previous censorship".* With such a recent history, we respectfully submit that the statute herein can merit no additional approval or obtain additional definiteness because of its longevity. Rather, it would appear that the aforesaid judicial history has only cast the meaning of the terms "obscene" and "indecent" in this State statute in a more obscure light.

History, therefore, sheds no light on the meaning of the statute here involved. It should be noted that there is a paucity of precedents in California on the meaning of "obscene" and "indecent" in the law. The *Wepplo* case is about the only one (decided in 1947) prior to the case herein. The same situation exists in other states. There are practical reasons for this situation, not the least of which is that very few authors and publishers relish a charge of "obscenity" and "indecency" in the public forums, and will often censor themselves or accept censorship rather than go through painful litigation, and, secondly, because the charges are usually instituted against a bookseller who, rather than suffer the stigma placed on his entire business, simply removes the interdicted books from his shelves. Thus, the statute has reached a "ripe

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*Following the decisions of this Court, the Pennsylvania Supreme Court in *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956), held that the statute authorizing an administrative body to pass upon "sacriligious, obscene, indecent, or immoral" motion pictures, or such as "tend to debase or corrupt morals", was void as offending the due process clause of the Fourteenth Amendment.

old age", avoiding persistent attack because of the very ambiguity of the language which makes it deserving of attack.

D. There Is No Scientific Data Available to Afford Any Ascertainable Standard of Guilt.

The issue here may be stated somewhat as follows: Is "obscenity" a matter of sense perception, discoverable by uniform and objective standards, existing in the nature of things, or does it exist entirely within the "mind's eye", dependent not upon the letter of any general scientific law, but in each person according to his own whims and prejudices, varying personal experiences and different degrees of intelligence about sex relations?

It is plain that profound sociological and scientific analyses of society and individuals in society are necessary before one can completely deal with the challenging questions arising out of attempts to regulate sexual ideas, relations and behavior. Within the confines of this memorandum, an extended discussion is not possible. All that can be done is to suggest some of the problems which arise in this area, particularly as they arise in the prosecution under the instant statute, and to discuss to what extent the scientists have agreed on answers to questions in this field.

Since the State has not definitively expressed the purpose of the statute, we are left only to an examination of its provisions. It would appear from the language of the law that its purpose is to prevent the sale of books which tend to arouse in their readers "lascivious thoughts" or "lustful desire". It may also be conjectured that the real object of the statute is to avoid possible "sexual misconduct" or other "anti-social" conduct by preventing persons

from becoming "corrupt and depraved" through such "lascivious thoughts" and "lustful desire". Whatever the real object of the statute, it must be immediately apparent that it raises more questions than it answers.

Without attempting to explore the entire nebulous area of sexual "purity" and "impurity", the question which immediately arises is to what extent do written books arouse sexual ideas of an "impure character"? No scientist appears to know the answer, though most who have written on the subject have indicated that there is little support for the exaggerated claims made by the vice societies in this area. Fundamentally, this is so because notions of "modesty" and "sex purity" have variations of an individual and societal character. As Ernst and Seagle point out in their chapter on "The Enigmas of Literary Decency", there are temporal, spatial, language, age and other considerations which make answer in this field completely impossible. *Supra,* pp. 38-65.

The stimulii in this field of "lustful desire" seem to be as varied as the responses. Most students of the subject seem to be agreed that there are so many variables here involved, that it is simply idle to isolate books as a motivating cause. "The sexually stimulative effect of erotic literature is enormously exaggerated. Literature occupies a very inferior position in the list of aphrodisiacs. There are many far more potent influences on sexual libido. Dancing exerts a powerful aphrodisiacal effect; so does alcohol; so does woman's dress; so does perfume. Yet no one suggests the prohibition or suppression of any of these aphrodisiacs on the ground of its "corrupting influence" or its power of inciting sexual passion. Indeed, the most powerful sexual stimulant of all, intimate contact of the sexes, it is impossible, in any extended or

complete sense, to guard against." Scott, G. R., *Into Whose Hands* (Lord, 1945), p. 5* Moreover, to ascribe the stimulation of sex images to books, while ignoring newspapers, radio and television, is to ignore reality.

Judge Frank in *United States v. Roth*, unreported (C. A. 2, 1956), cert. pend. No. 582, Oct. Term 1956, recounts a summary of the conclusions of the social scientist, Dr. Jahoda, on a report made by Dr. Jahoda and associates entitled "The Impact of Literature: A Psychological Discussion of Some Assumptions in the Consorship Debate" (1954). The Jahoda Report finds it virtually impossible to determine the impact of literature on the mind of the reader. "Some evidence suggests that the particular

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*"Thus, books on sexual psychology tell us of men who are so 'pure' that they have their modesty shocked by seeing a woman's shoe displayed in a shop window; others have their modesty offended by hearing married people speak of retiring for the night; some have their modesty shocked by seeing in the store windows a dummy wearing a corset; some are shocked by seeing underwear, or hearing it spoken of otherwise than as 'unmentionables'; still others cannot bear the mention of 'legs', and even speak of the 'limbs' of a piano." Schroeder, *supra*, p. 275.

"As a curiosity, and also to underline the continuous change of views in this area it may be worth mentioning here that all reading of novels, not only of 'bad' ones, was once considered as undermining the power of resistance of every woman. One Bostonian who in 1819 published a weekly *Something* under the pseudonym Nemo Nobody, Esq. had this to say about the subject: 'A young man acquainted with the world might say, show me any young woman who is a constant novel reader, and I will seduce her; and the task, horrid as it is, would be easy accomplished. Examine the general opinions of even young men, and you will find that the more females are found to be addicted to novel-reading, the less are they esteemed virtuous; examine the opinions of elders, and you will find the less are they esteemed sensible. A devotion to novel-reading indicates a mind of an inferior capacity and grovelling exercise; it encourages not, but weakens its energies, it causes it to waste its essence on phantoms, when it should by it invigorate realities.'" *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954), Dr. Jahoda and Associates, p. 11, n. 8.

communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose themselves to everything that is offered, but only to what agrees with their inclinations."

Perhaps all one can do in the light of the aforesaid is to agree with Judge Bok: "I can find no universally valid restriction on free expression to be drawn from the behavior of 'l'homme moyen sensual', who is the average modern reader. It is impossible to say just what his reactions to a book actually are. Moyen means, generally, average, and average means a median between extremes. If he reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanic's Lien Act while his sensuality is high, things will stand between him and the page that have no business there." *Commonwealth v. Gordon,* 66 D. & C. 101, 137 (1949).

Plainly, if it is impossible to determine the effect of literature on the mind of a reader so far as his sex reactions are concerned, it becomes more difficult to determine whether books, acting on the mind, are the cause of "sex misconduct". Nevertheless, it should be noted that even on a basis of *arguendo*, no scientific evidence is available to support a finding of a nexus between literature and "sex misconduct". In the first place, there is no agreement as to what "sexual misconduct" is envisaged. Sexual images, no matter how "impure", will probably not be proscribed if they lead to marriages. Is any relation with the opposite sex, other than marriage, the object of the statute? Is it some sex deviation like homosexuality? The complexity of the problem is shown by the difficulty which even experts in the field of criminal law have when

dealing with "sexual offenses".* Judge Frank has pointed out in *United States v. Roth, supra,* that it is impossible to assert with any assurance that "obscenity" represents a ponderable causal factor in sexually deviant adult behavior. "What little competent research has been done, points definitely in a direction precisely opposite to that assumption."

It is submitted, therefore, that the statute herein, on its face and as construed, sets no definable standards by which persons, judges, juries or lawyers can determine what it is the law forbids or permits. Neither the dictionary, judicial precedent, the common law, history or science offer any ascertainable standard of guilt. In operation and effect, the law permits the creation of *ex post facto* crimes by the "finders of fact". Conviction under such a statute operates to deprive an accused, as it has in this case, of every essential element of procedural due process of law.**

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*"At the present time 11 of the 48 states have no fornication statutes, and only 18 punish a single act of intercourse between unmarried persons (four of these by fine alone) . . . American penal laws against illicit intercourse are generally unenforced . . . We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences: . . . In sum, the major issue of policy in this field is whether to abandon immoral law altogether as a device for regulating voluntary heterosexual behavior, or to attempt to restrict the liability to certain classes of behavior involving an identifiable secular evil which can be effectively controlled by penal law." American Law Institute, *Model Penal Code,* Tentative Draft No. 4 (April 25, 1955), pp. 204-10.

**The history of liberty has largely been the history of observance of procedural safeguards." *McNobb v. United States,* 318 U. S. 332, 347.

II.

The Statute Upon Its Face, and as Construed, Permits the Punishment of the Exercise of Freedom of Speech and Press and Acts as a Censorial Control of Free Expression in Art and Literature, Depriving Persons of Their Liberty and Property Without Substantive Due Process of Law.

The great significance which this Court places upon the free exercise of freedom of speech and freedom of the press in the United States needs no lengthly elucidation and has been mentioned earlier. The libertarian, humanitarian and utilitarian values of these freedoms in a democratic society have often been stressed. It is not too much to say that the decisions of this Court emphasizing the importance of speech and press in the advancement of truth, science and art has the unbroken and impressive support of all the leading figures in the history of civilization. "The mind is in chains when it is without the opportunity to choose. One may argue, if one please, that opportunity to choose is more an evil than a good. One is guilty of a contradiction if one says that the opportunity can be denied, and liberty subsist. At the root of all liberty is the liberty to know. . . . Experimentation there may be in many things of deep concern, but not in setting boundaries to thought, for thought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity." Cardozo, *The Paradoxes of Legal Science* (N. Y., 1928), pp. 104-5.

Thus, this Court has held that the rights of free speech and a free press "are not confined to any field of human interest". *Thomas v. Collins*, 323 U. S. 516, 531. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but

they chose to encourage a freedom which they believed essential if vigorous enlightenment were ever to triumph over slothful ignorance." *Martin v. Struthers,* 318 U. S. 141, 143. One of the prerogatives of American citizenship is the right to criticize—"and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States,* 322 U. S. 665, 674. Hence, a community may not suppress "the dissemination of views because they are unpopular, annoying or distasteful. . . . That would be a complete repudiation of the philosophy of the Bill of Rights." *Murdock v. Pennsylvania,* 319 U. S. 105, 116. "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut,* 310 U. S. 296, 310.

Because, therefore, of the wide scope which the Constitution gives to the exercise of freedom of speech and press, statutes will be held void upon their face where they do not specifically aim at evils within the allowable area of state control, but, on the contrary, sweep within their ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. *Thornhill v. Alabama,* 310 U. S. 88. Such statutes operate as an overhanging threat to free discussion *Bridges v. California,* 314 U. S. 252, 296. A vague and indefinite statute which permits the punishment of the

exercise of free speech, and by its inexact terms discloses a threat to that freedom, *inherent in the very existence of the statute*, offends the Constitution. *Stromberg v. California*, 283 U. S. 359; *Carlson v. California*, 310 U. S. 106. And, where a statute as construed by the state courts seriously invades the First Amendment rights, it is immaterial that it also may be given a scope which does not infringe upon that right. *Terminello v. Chicago*, 337 U. S. 1.

As we have endeavored to demonstrate in Point I above, the state statute here on its face, and as construed, is not narrowly drawn. We have pointed out that it is neither limited in the class of readers nor in the contents of the books. We have also shown that the "evil" at which the statute is purportedly directed is obscure and undefinable. Aside from the absence of any proof that such "evil" exists, it would appear clear from the aforesaid that a state is without power under the Constitution to control the "lascivious thoughts" and "lustful desire" of its citizens. "Thus the (First) Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection." *Cantwell v. Connecticut*, 310 U. S. 296, 303.

It is only some "conduct," clearly defined, which a state has power to control. The statute here makes no attempt to set forth the "evil conduct" which the statute is intended to prevent. We are left to guess, and as we have shown, that guess must be extremely tentative because there is no proof that books necessarily lead to

The question is, therefore, whether a statute so vague and unconfined as the one herein, acting as a pervasive censor of all books written, published, sold and distributed in the State, can be justified as an exercise of the "police" power of the State. As against the contention that it may should be weighed the serious consequences of such a censorship statute.

(a) The social functions of books is profound. Their function is to disseminate ideas and emotions "not moralities." Alpert, L. M., *Judicial Censorship of Obscene Literature, supra,* p. 75. Indeed, it it only through the development of ideas, that changes in morals are brought about. If literature is restricted in the enunciation of sex ideas, one of its functions will be destroyed to society's loss.

(b) Serious damage may be done to the health and welfare of the community by censorship of "obscene" literature. The history of literary censorship shows that the struggle against veneral diseases has been considerably retarded by the stigma of "obscenity." The same dogma has been responsible for the breakup of many marriages, and the physical and mental deterioration of the lives of many young persons unversed in the requirements of sex relations. The damage done to society in these respects is irretrievably great. Schroeder, *"Obscene" Literature and Constitutional Law* (N. Y., 1911); Ernst and Seagle, *To the Pure* (N. Y., 1928).

(c) The effect of such "moral" censorship as is involved here is the prosecution of many of the most famous works of art, often of great genius and vital moral worth. The category of censored books runs from the *Bible* through Gibbon's *Decline and Fall of the Roman*

Empire, Swift's *Gulliver's Travels,* Stowe's *Uncle Tom's Cabin* and Remarque's *All Quiet on the Western Front.*

(d) Censorship of this nature abridges the exercise of fundamental freedoms of speech and press, without which a democratic society cannot long endure. It does precisely what every vital restriction of free speech does in the long run. It drives attempts to obtain reforms in sex morals underground, and by suppressing such reforms, transforms them only into anarchistic "sex revolutions." Moreover, while purporting to suppress "obscene" literature, in crazy quilt fashion, the censor succeeds only in suppressing a free press in the same absurd fashion. The erosion of fundamental rights weakens the entire base of our constitutional system.

(e) Censorship feeds upon itself. The zeal for "fresh cases" is indefatigable. It has a corrupting influence on those who exercise the power. The censor constantly attempts to justify its existence, bringing within the orbit of "obscene," "smut" and "dirt" new books and writings. There is also the tendency under the guise of "obscenity" to prosecute the political and social non-conformist or even particular personal enemies. Many of the social evils of civilization are largely caused by the censor. It is stultifying and it is futile. Censorship is in essence repressive, and repression of social sores lead only to their extension and consolidation.

> "The virtue which the world wants is a healthful virtue, not a valetudinarian virtue—a virtue which can expose itself to the risks inseparable from all spirited exertion—not a virtue which keeps out of the common air for fear of infection and eschews the common food as to stimulating. It would be indeed absurd to attempt to keep man from acquiring

those qualifications which fit them to play their part in life with honour to themselves and advantage to their country, for the sake of preserving a delicacy which cannot be preserved—a delicacy which a walk from Westminster to the Temple is sufficient to destroy." MacCauley, *Critical and Historical Essays* (1943), Vol. III, p. 256.

(f) The premises that obscenity laws are valid because allegedly directed only at suppressing "dirt for dirt's sake" is not only demonstrably disproven, but additionally in itself represents a very important misconceiving of the basic-most values and purposes of free thought and expression in a free society.

In a society grounded on individual liberty the people must be allowed to decide for themselves which books are good and which bad. As a nation we have staked our all on the "power of reason" and the ability of the people to choose wisely between good and evil. See Holmes—Brandeis dissenting in *Abrams v. United States*, 250 U. S. 616, and concurring in *Whitney v. California*, 274 U. S. 357. As the "ultimate tribunal" the people must daily choose good from bad in the most vital and widespread areas. They must choose between good and bad leaders; good and bad policies; good and bad laws.

Why then may they not be trusted to choose between good and bad books? If we cannot trust the people to choose which books they will read how can we trust them to govern themselves? The fact is that democracy *works* in the area of sex literature and art as nobly, and well as it does in politics. Finally, not to trust men with freedom to judge and choose in the area of sex literature and art would ultimately destroy the entire democratic base for freedom in any sphere.

Judge Frank asserted this position in scholarly fashion in *United States v. Roth, supra:*

> "According to our ideals, our adult citizens are self-guardians, to act as their own fathers, and thus become self-dependent. When our governmental official act towards our citizens on the thesis that 'Papa knows what's good for you,' they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature."

He then drew upon the great thinkers of all time to support this proposition. Thus:

Milton said in Aeropagitica:

> "We censure them for a giddy, vicious and unguided people in such sick and weak (a) state of faith and discretion as to be able to take down nothing but through the pipe of a censor . . . . The great art lies to discern what the law is to bid restraint and punishment, and in what things persuasion only is to work."

Jefferson wrote to Dupont de Nemours:

> "We both consider the people as our children, but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self government."

De Tocqueville observed:

> "No form or combination of society has yet been devised to make an energetic of a community of pusillanimous and enfeebled citizens."

Goethe warned:

> "Man is easily accustomed to slavery and learns quickly to be obedient when his freedom is taken from him."

Carl Becker remarked:

> "Self government and the spirit of freedom that sustains it, can be maintained only if the people have sufficient intelligence and honesty to maintain them with a minimum of legal compusion. This heavy responsibility is the price of freedom."

Judge Frank concluded with Jefferson's advice:

> "The only completely democratic way to control publications is through non-governmental censorship by public opinion."

Conclusion.

The aforesaid are some of the factors which should weigh heavily in considering the constitutionality of an "obscenity" statute. It was because the appellant in *Butler* appeared largely to overlook these considerations in the oral argument before this Court that the appellant herein moved for permission to intervene in *Butler,* or in the alternative, for a consolidation of the two causes. It is hoped that this further memorandum will persuade this Court to invoke jurisdiction in the instant case so that the important constitutional questions presented may be weighed and answered. The issues would appear to be of paramount public importance.

It should also be noted, finally, that appellant Alberts raises here two additional questions of grave constitutional importance not heretofore decided by this Court. See, Jurisdictional Statement, pages 23-24 and 25-31.

By reason of the vague and indefinite sweep of the statute, the prosecutor and the judges have been unable to agree which of the books herein are "obscene." Appellant stands convicted of keeping for sale by mail and advertising by mail, "obscene books" but which of the "obscene" books has resulted in affirmance of his conviction, appellant does not know. On this basis, appellant might be prosecuted again for subsequent possession of the same collection of books without being able to plead his former judgment of conviction. Moreover, the state's action manifestly conflicts with federal control of the mails in an area where Congress has occupied the field, and thus undermines the supremacy provisions of the Constitution.

This Court, it is respectfully submitted, should take jurisdiction, hear and decide the appeal herein. The judgment of conviction should be reversed.

Respectfully submitted,

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"lascivious thoughts" or "lustful desire," nor that these thoughts and desire lead to any "conduct" at all. Moreover, assuming that "conduct" does emanate from such "thoughts" and "desire," we can only guess at the type of conduct which the state considers "sexually illegal," and we can only speculate as to the extent to which "lustful desire" directly incites such "sexual misconduct." It is submitted, therefore, that if an "evil" exists, the state has made no effort to confine the provisions of the law to the specific "evil." For these reasons, we do not reach in this case, it is respectfully submitted, questions revolving around "morality" and "licentiousness" in broad societal terms. If there is any area where "obscene" books can be shown or reasonably believed to provoke unlawful "conduct," the state has made no attempt to delimit the area. Both Judge Frank in *United States v. Roth, supra* and Judge Bok in *Commonwealth v. Gordon* endeavored to show that such "conduct" statute could be narrowly drawn within permissible constitutional limits. Other writers assert that no such "obscenity" statute can be drawn, nor should it be. See, Alpert, L. M., *Judicial Control of Obscene Literature, supra,* pp. 70-76. That fundamental question is not reached here because this statute patently has not been "canalized" and falls squarely within the condemnation of the First and Fourteenth Amendments.*

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*A different question is presented when specific language (whether denominated as "obscene", "profane", "lewd" or "fighting words") directly and intentionally incites to acts of violence by the persons to whom, individually, the language is addressed. See, *Chaplinsky v. New Hampshire,* 315 U. S. 568. The state has the power to prevent direct incitements to riot or to physical attacks upon others. But the "evil" must be specific and specifically described. On the other hand, a great variety of conduct cannot be

III.

The Statute, on Its Face and as Construed, Constitutes a Punitive Censorship Statute Which the State Is Without Power to Enact Under Our Constitutional System.

A statute as vague and indefinite as the one herein, with its inherent tendency to inhibit the flow and reception of ideas, opinions and beliefs, is a censorship statute, no more compatible with the Constitution because it punishes after the expression of an idea than the stifling of the idea before it is given expression. As was stated in appellant's Jurisdictional Statement [p. 14], "a standard even for subsequent criminal punishment cast in so vague and indeterminate a manner as to permit the enforcer to exercise, assert or threaten arbitrary, discretionary and unconfined power of enforcement, as at bar, is unconstitutional, and is as censorial in consequence and effect as is arbitrary power in form of prior restraint." Such issues which may arise as to distinctions between previous restraint and subsequent punishment by a state in limited areas of speech directly inciting to unlawful conduct or materially injuring specific individuals has no bearing here where the statute is unconfined and vagrant, directly threatening the exercise of constitutional freedoms. "Where the First Amendment applies, it is a denial of all governmental power in our Federal System." *Marsh v. Alabama*, 326 U. S. 501, 511.

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swept into a statute under a general and indefinite characterization (*Cantwell v. Connecticut*, 310 U. S. 296, 308), nor, as in the instant case, can the forbidden "conduct" be entirely omitted from the statute with the executive and judicial arms of government left free in their own discretion to determine when an "obscene book" will lead to a "lustful desire" and in turn to "sexual misconduct." The dangers to free thought are too great under such circumstances.

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I.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

BRIEF FOR THE APPELLANT.

Opinion Below.

The opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles and the Memorandum Opinion denying a rehearing [R. 19-23] are reported at 138 Cal. App. 2d. (Supp.) 909, 292 P. 2d 90. The Trial Court's oral statements in denying the motion to acquit [R. 80-93] and in rendering its verdict [R. 116-118] are not reported.

Jurisdiction.

Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles entered and

filed December 29, 1955 [R. 21-22], rehearing denied January 12, 1956 [R. 22-23]. Appellant was convicted on two counts of violating California Penal Code, Section 311, subds. 3 and 4 [R. 1-2, 5, 118] making it a crime, *inter alia,* to advertise or keep for sale *any book* which is obscene or indecent.

The constitutional validity of California Penal Code, Section 311, subds. 3 and 4 was drawn in question in the Statement on Appeal [R. 6-11] on the ground of its being repugnant to the First and Fourteenth Amendments to the United States Constitution and to Article I, Section 8, Clause 7 of the United States Constitution [R. 10]. The State Court in affirming the validity of California Penal Code, Section 311, as applied to appellant notwithstanding his assertion that it was repugnant to the United States Constitution said:

> 1. "The words 'obscene or indecent' as used in . . . section 311 are not unconstitutionally indefinite . . . To be sure, it is not always easy to decide on which side of the line a book should be placed . . ." [R. 20.]
>
> 2. "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute (Section 311) inoperative." [R. 20-21.]

The Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles is the highest state court available to appellant. (Cal. Const., Art. VI, Sec. 5; *Edwards v. California,* 314 U. S. 160.)

Notice of appeal to this Court was filed in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles on March 26, 1956. On April 11, 1956, appellant filed his Jurisdictional Statement, and by leave of Court he filed on January 10, 1957, a Further Memorandum. Probable jurisdiction was noted January 14, 1957 [R. 119]. This Court's jurisdiction to review the judgment is conferred by Title 28, United States Code, Section 1257, subd. 2. The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal in this case: *Butler v. Michigan*, No. 16, October Term, 1956; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; *Winters v. New York*, 337 U. S. 507; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.

Statutes Involved.

The statute, the constitutionality of which was drawn in question, California Penal Code, Section 311, subds. 3 and 4, provides:

> "Every person who wilfully and lewdly, either:
>
> * * * * * * * *
>
> "3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,
>
> "4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . ."

is guilty of a misdemeanor punishable by fine and imprisonment.

The Trial Court [R. 83, 88, 98] and the Appellate Department [R. 20] relied upon *People v. Wepplo,* 78 Cal. App. 2d (Supp.) 959, 178 P. 2d 853 (1947), which is the only authoritative State interpretation of California Penal Code, Section 311. As interpreted, any book is obscene if it "has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

Appellant contends that this statute on its face, and as construed and applied, violates the First and Fourteenth Amendments to the United States Constitution. The First Amendment as applicable here provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . ."

The Fourteenth Amendment as applicable here provides:

> "No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute was applied in this case to the *mailing* of circulars advertising books and keeping of books for sale *by mail.* This aspect of the case involves Article I, Section 8, Clause 7 of the Constitution of the United States, and Title 18, United States Code, Section 1461, and Title 39, United States Code, Section 259, subd. (a).

Article I, Section 8, Clause 7 of the Constitution provides:

> "The Congress shall have Power . . . To establish Post Offices and post Roads."

Title 18, United States Code, Section 1461, as here applicable provides:

Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, devise, or substance; and

. . .

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or from whom, or by what means any of such mentioned matters, articles or things may be obtained or made, whether sealed or unsealed . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisonment not more than five years, or both.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination. As amended June 28, 1955, c. 190 §§1, 2, 69 Stat. 183.

Title 39, United States Code, Section 259a, provides:

Exclusion from mails of obscene, lewd, etc. articles, matters, devices, things, or substances.

Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempt-

ing to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes. Aug. 16, 1950, c. 721, 64 Stat. 451.

Questions Presented for Review.

1. Does the said California statute on its face and as construed and applied violate the appellant's rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States in that:

(A) Its provisions prohibit and punish the publication and distribution of books fairly within the area protected by the freedom of speech and press provisions of the Constitution, particularly when the legality of the book is measured by its effect upon the *thoughts* and *desires* of its readers.

(B) Its provisions are so elastic and far reaching as to encompass virtually all literature and art, thus giving censorial control of free expression to the trier of fact.

(C) Its provisions are so vague and indefinite that they fail to give adequate warning to those subject to its prohibitions as well as to provide proper standards for adjudication, particularly where, as in the case at bar, it is impossible to determine even after conviction and affirmance in the State courts in what particular appellant offended the law.

2. Does the said California statute as applied here to the mailing of circulars advertising books and the keeping of books for sale by mail violate Article I, Section 8, Clause 7 of the United States Constitution and infringe unlawfully on a sphere of activity reserved exclusively to the Federal government, respecting which the Federal government has fully legislated, preempting the field?

Statement of the Case.

On June 10, 1955, appellant was found guilty on Counts I and II of a four count complaint [R. 5, 118] which charged him, *inter alia,* with (I) keeping for sale and (II) advertising obscene or indecent books in violation of California Penal Code, Section 311, subds. 3 and 4. He was placed on summary probation for two years on condition that he not violate California Penal Code, Section 311, or have in his possession any obscene or indecent literature or pictures, and on the further condition that he serve sixty days in the County Jail and pay a fine of $500.00 [R. 5].

The case against appellant consisted simply of proving that he mailed [R. 47-48, 107-109] advertising brochures [Ex. 2, R. 26; Ex. 3, R. 27; Ex. 8, R. 32], and kept merchandise in his warehouse to fill by mail the orders received by mail [R. 101, 108, 110].

He was convicted on Count I for keeping (in his warehouse) books for sale by mail [R. 80-81]. He was convicted on Count II for mailing circulars advertising books [R. 80-81].

While pictures as well as books were introduced in evidence [Ex. 4, R. 27; Ex. 6, R. 28; Ex. 12, R. 38; Ex. 13, R. 39; Ex. 14, R. 39; Ex. 15, R. 40; Ex. 16, R. 40; Ex. 19, R. 53; Ex. 20, R. 53] the Appellate Department stated that its judgment affirming the conviction was based only upon a "keeping for sale" and "advertising" of *books* found to be "obscene and indecent." That Court said:

> "The defendant was convicted on two charges based on Section 311 of the Penal Code that he had lewdly kept for sale obscene and indecent books and

that he had lewdly written, composed and published an advertisement of them." [R. 19.]

Later the Court said:

> "Moreover, while the type of pleading being considered lends itself to an unfair prosecution, actually, in this case the defendant was not prejudiced; he would have been no better off had the charge been simply that he kept obscene books for sale." [R. 20.]

And finally the Court said:

> ". . . [T]hat some of the books were obscene we do not consider debatable." [R. 21.]

Prior to his arrest and on February 25, 1955, appellant was served with a search warrant and his business office and business warehouse as well as his residence were searched [R. 24, 35, 51-52]. The arresting officers seized and carried off as matters material to the arrest books, pictures and related matters to the number of "hundreds or possibly thousands" [R. 30-31] removing the items in "automobiles and a small truck" [R. 31].

The complaint was in the exact language of the statute [R. 3] and the charge against appellant was simply that in the matters seized he had somehow violated California Penal Code, Section 311, subds. 3 and 4. The offending books or other items were not identified. At the trial the District Attorney selected from the hundreds or thousands of items seized thirty-one books, ten magazines and a large number of pictures and introduced them in evidence together with three different mail order advertising circulars and mailing labels. The books introduced were introduced in groups, as collective exhibits, thirty-one books and ten magazines being offered under eight exhibit

numbers as follows: Exhibit 1 (11 books), Exhibit 5 (9 books), Exhibit 9 (5 books), Exhibit 10 (10 magazines), Exhibit 11 (1 book), Exhibit 21 (4 books), Exhibit 22 (1 book). These several books grouped by exhibit numbers were:

Exhibit 1: "Ballad of a Nun and Other Poems," "Homosexual Life," "Letters of the Courtesans," "How to be Married Though Happy or How to be Happy Though Married," "The Prostitute and Her Lover," "The Love Affair of a Priest and a Nun," "Amorous Tales of the Monks," "Wild Women of Broadway," "Strange Marriage Customs," "Confessions of a Minister's Daughter," "The Fleece of Gold."

Exhibit 5: "Petting as an Erotic Exercise," "Bestiality and the Law," "Male Homosexuals Tell Their Stories," "The Business Side of the Oldest Business," "Questions and Answers about Oragenital Contacts," "The Picture of Conjugal Love," "William Heirens—Notorious Sex Maniac," "Female Homosexuals—Lesbians Tell Their Stories," "Bestiality in Ancient and Modern Times."

Exhibit 9: "To Beg I am Ashamed," "Witch on Wheels," "The Pleasures of the Torture Chamber," "Snow Job," "She Made It Pay."

Exhibit 10: Ten different issues of "Good Times" magazine.

Exhibit 11: "Sword of Desire."

Exhibit 21: "Padlocks and Girdles of Chastity," "Straps and Stripes," "Memoirs of a Spankee," "Slaves of the Lash."

Exhibit 22: "Unique for Lovers of the Unusual."

The Trial Court stated and ruled that the books in Exhibit 1 were not obscene [R. 84]. The Trial Court further ruled that the books and magazines in Exhibits 10, 21 and 22 would not be considered by him for the reason that they were not shown to have been kept for sale [R. 90, 92].

The Trial Court found obscenity in the books in Exhibit 9 [R. 88-90] and Exhibit 11 [R. 90], although the Court did not read the books in their entirety [R. 88, 90]. In ruling that the books in Exhibits 9 and 11 were obscene, the Court pointed to what it believed was an excessive writing about "sex"[1] [R. 88-90]. Speaking of the book "Witch on Wheels," Exhibit 9 [R. 89], the Court said:

> "I assume that I could probably turn this book and open it at almost any page and find something which relates to sex in a manner which, in my opinion, is lewd and obscene."

Speaking of the book "Snow Job," Exhibit 9 [R. 89], the Court said:

> "And I suppose I can go through the rest of the book and continue to find references to sex, because that definitely seems to be what it is for."

Discussing "She Made It Pay," Exhibit 9 [R. 90], the Court said:

> "This goes into a most vivid and lengthy description of conduct of a couple, a white boy and, I believe, a colored girl leading up to a most vivid climax."

---

[1]On three different occasions the Trial Court expressed the view that unless a person had a "reason" to read about sex it was "wrong" to do so [R. 86, 88, 93].

Discussing "Sword of Desire," Exhibit 11 [R. 90], the Court said:

> "This book is about a psychiatrist who is using his ability in the touching of certain nerve centers, and so forth, to develop a sexual desire in any woman. Up to where I read he had used it twice. I did not go up beyond page 49."

On appeal appellant argued that he could not be convicted for the possession of the books in Exhibits 9 and 11 for the reason that they were not shown to have been kept for sale. Replying to this argument the respondent before the Appellate Department urged that affirmance could and should be placed on Exhibit 5 or some of the books therein notwithstanding that the Trial Court had found such books not to be obscene [R. 15]. At the request of the Appellate Department [R. 12] respondent furnished an analysis of the exhibits which included a classification of the exhibits between not obscene, moderately obscene, very obscene, heterosexually obscene and sado-masochistically obscene [R. 13-14]. In this analysis respondent listed three of the books in Exhibit 5 as being very obscene [R. 13], although, as we previously observed, the Trial Court found the books in this exhibit to be not obscene [R. 86-88]. Appellant argued that the Appellate Department could not properly affirm the conviction below upon evidence which the Trial Court found would not support a conviction [R. 15]. Pressed between the arguments of appellant and respondent the Appellate Department failed to designate which books were the basis of the conviction, merely stating that some of the books were obscene. Accordingly, appellant knows no more after trial and affirmance than he knew before as to which particular books offended the law.

ARGUMENT.

Summary of Argument.

1. In order to delimit the broad constitutional questions involved in this proceeding, it is important preliminarily to dispose of some subsidiary issues which will help to disclose what is and what is not involved in this case.

(a) The statute here is not a "conduct" statute like the one involved in *Chaplinsky v. New Hampshire*, 315 U. S. 568. It has not been construed narrowly against speech which directly provokes to a breach of the peace. Here the State has attempted to control thought alone, has fixed a standard which punishes any writing or circulation of a book which may arouse "sexually impure" thoughts and desires. The State has entered the domain of its citizens' privacy—their beliefs, thoughts, emotions and sensations.

(b) The question of censorship here should not be beclouded by arguments concerning the relative merits of "prior restraint" or "subsequent punishment." Freedom of the press from all governmental censorship, prior or subsequent, is the fundamental rule in our constitutional system. There are expressions of opinion which may be free from previous restraint, but punishable subsequently when merged with conduct. This statute, however, deals only with the communications of ideas from one person's mind to another person's mind.

(c) The question of "particular application" is also only a subsidiary issue here. The instant statute by the breadth of its construction sweeps within its ambit activities which constitute only the exercise of freedom of speech and press, and operates as a threat to these free-

doms by its very existence. The attempt, nevertheless, to equate the standard of the statute with "hard core" obscenity is equally invalid. The term is only reducible ultimately to but another ambiguous standard used by the State to restrict any expression in art or writing which officials may deem "obscene." History demonstrates that nothing is more uncertain than "hard core" obscenity, and the standard has been used to suppress social, political, religious and scientific ideas of the greatest utility to mankind.

(d) In the area of procedural due process, certain questions debated in *Winters* are not presented here. This is not a statute which punishes coercion and incitement to prescribed unlawful conduct, and the question is therefore not presented whether certain utterances may be constitutionally encompassed within such area of coercion and incitement. Nor is the question presented here merely one of legislative policy in drafting criminal legislation. This statute has the fatal defect of uncertainty in the terms of its condemnation, in the want of definiteness in what the law prohibits. The state of mind of a "normal sensual man" is not ascertainable, and comparison with the "conduct" of a "reasonable man" in negligence cases is untenable. The statute here is reminiscent of an alien doctrine that persons may be punished for "socially dangerous" conduct even without specific statute and by standards fixed retroactively only by a court or jury.

(e) Whether a statute could be more narrowly drawn, as suggested by Judge Frank and Judge Bok, or whether "mental obscenity" statutes are constitutionally permissible in any case, is also not in issue here in view of the breadth of construction of the present statute. The attack upon the constitutional validity of this statute is not a

defense of "licentiousness." The power of the State in the domain of public morals to regulate conduct which purposefully and coercively incites directly to the injury of members of society is not denied. This statute, however, is devoted solely to the restriction of books which stimulate ideas, thoughts and desires. Nothing in its "age" or its history can support the validity of such a statute, especially in the light of the decisions of this Court since 1925 construing the fundamental guarantees embodied in the First and Fourteenth Amendments.

2. With the issues thus delimited, it is important first to note how broad and vague and incomprehensible are the standards, "obscene or indecent," as construed by the court below. There are such variables to consider as the meaning of a "lascivious thought" or "lustful desire"; what book will stimulate such thought or desire; and when a reader becomes corrupt or depraved by having a "lascivious" thought or "lustful" desire.

The search for answers to these and related questions is fruitless by all conceivable tests ordinarily used to determine the meaning of a statute. The encyclopedias concede that the standard of "obscenity" is decidedly ambiguous. Dictionaries define the terms "lascivious" and "lustful" solely in tautological abstractions. The words appear to have as many constructions and applications as there are different languages, countries, communities, localities, mentalities, conceptions and temperaments.

Nothing in the common law or early colonial history suggests that the mere stimulation of erotic thoughts or desires by the reading of books was considered a punishable offense. The few English cases demonstrate that only impious libels—attacks upon religion—or conduct

which provoked a breach of the peace, came within the purview of the law. Hawkins in his *Pleas of the Crown* stated at the end of the eighteenth century that "a writing full of obscene ribaldry, without any kind of reflection upon anyone, is not punishable." The same view obtained in colonial America.

It was not until 1857 in England with the passage of Lord Campbell's Act that prosecutions against "obscene" literature began. Even here, no attempt to define "obscenity" was made in the law, the statute being simply proposed as a measure to prevent the corruption of the morals of youth. The law was hotly opposed as contrary to the law of the land. It was applied in *Regina v. Hicklin* against a religious tract. An "obscene" book was construed as having contents tending to deprave and corrupt "those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall." The *Hicklin* rule, essentially embodied in the statute here, was transported to the United States and inspired the federal Comstock Act and similar state statutes.

Judicial precedents also lend no meaningful concept to the terms "lascivious thoughts" or "lustful desire" in the obscenity statutes. The courts have made no attempt at definition, leaving the construction to the *ad hoc* judgment of courts and juries in particular cases. In the light of this Court's interpretations of the extensive meaning of freedom of speech and press, it is impossible to determine from "common understanding" or "precedents" what is encompassed by books which incite "lascivious thoughts" or arouse "lustful desire."

Nor is there any body of scientific knowledge which suggests an answer. There is no clinical evidence as to

what "obscene" books stimulate "sexually impure" thoughts or conduct. In fact, many studies in the field indicate that very little sex information or erotic response is obtained from books, as contrasted with a vast conglomeration of conditions, persons and things from which such information and response are derived. The matter is further complicated by the fact that many so-called "sexually impure" ideas and conduct, which books are supposed to stimulate, are all widely held or committed in society today without thought of condemnation.

The statute here, with its vague and unconfined standards, casts a net as broad as all books in circulation and all persons connected with books, leaving it to a jury to determine arbitrarily who has and who has not offended the law.

3. The crux of the issue here is the validity of such unconfined standard in relation to the essential freedoms which the First and Fourteenth Amendments were intended to protect from governmental intrusion. The standard in the statute, as construed, vests in the State the arbitrary power to suppress and punish any speech, art or thought deemed "obscene" by government. This is the essence of censorship in the realm of the intellect. This Court has uniformly stricken down proscriptions or prohibitions against expressions of ideas when cast in vague, unconfined, censorial terms, no different in principle and substance to the characterization "inciting lascivious thoughts" or "arousing lustful desire."

History proves that within the compass and sweep of such undefined standards, speech, art and communication of the highest social significance, and clearly protected by the First Amendment, have been abridged and suppressed.

The *Index Librorum Prohibitorum* created by the standards of "obscenity" and "lasciviousness" includes virtually all of civilization's honor roll of art and literature. History confirms plainly, and tragically, that such unconfined standards will be inclusive of all works of art and literature. In the political, religious, social, economic, scientific and cultural areas, the sex aspects of life are necessarily fused with other critical aspects of life—if literature, art and thought are to be honest and creative. It is impossible to restrict one aspect without suppressing the other.

In repressing "obscene" literature and art, the censor succeeds only in suppressing much critical thought of great social value. Much political and social criticism has been suppressed as "obscene." Religious views have been extirpated because "heretical," "immoral" and "obscene." The early English "obscenity" cases were prosecutions against religious tracts critical of church abuses and practices. The Bible has been suppressed, even burned, on numerous occasions in order to prevent "corruptive" influence or to protect against "immorality." Critical scientific discussion in the area of sex relations has been suppressed as "obscene."

Since these vague standards do sweep within their terms broad areas of art, thought and speech undoubtedly protected from governmental infringement, the varied judicial attempts to save some books from proscription by reading "exceptions" into the law, which has not been done here, are essentially fruitless. Making "exceptions" leads to arbitrary choice of what is "good" or "bad." Neither "age," nor "artistic worth and skill," nor "sincerity of intent and purpose," can avoid the vice of this

totally all-inclusive and fatally vague prohibitory standard over speech and thought.

The separation of "good" books from "bad" books by the standard of "hard core obscenity" is equally untenable. Both as to conduct and expression, societies have been so varied as to what is "obscene" as to make it impossible to suggest that something disapprobated is nevertheless evil or wrong. What will arouse condemnation as "obscenity" or "indecency" with respect to conduct or expressions of the most open and intimate sexual nature, varies with race, time, place and circumstances. Sexual morality is a field upon which there are less final conclusions than any other. Suppression of voluntary writing or reading, without relation to unlawful conduct, under a standard of "hard core obscenity," can undermine the search for truth in an area where democratic solutions are vitally necessary for the health and welfare of society.

4. The suppression of all books which stimulate "lascivious thoughts" or "lustful desire" should be balanced against the devastating consequences to society from such vast inroads to freedom of speech and press. Once a standard is enforced as vague as the standard herein governing "obscene" or "indecent" publications, the most significant societal values are necessarily lost.

The censorship of books which allegedly stimulate "sexual impure" ideas is basically a desire to maintain the *status quo* in sex attitudes, while recognizing that different convictions, tastes and judgments exist. The attempt is to coerce unanimity of opinion by authority who assumedly has divined the "truth" concerning sex morality and attitudes. The result is only evasion and corruption of ideas and persons. The censor creates only fear and

self-censorship; places all ideas of social change in jeopardy by the cry of "obscene"; and destroys the opportunities for learning the truth in an area closely linked with the health and welfare of the community.

The broad interdiction of art and literature which is made possible here affects virtually the entire cultural, spiritual and intellectual life of the people. Art and literature are a reflection of society at any given time in all its manifold manifestations. They express an endless variety of opinions, and afford opportunities for private relaxation and contemplation, as well as opportunities for the search for truth, without which the pursuit of happiness is largely frustrated.

Finally, the suppression of writings because of their alleged stimulation to thoughts and desires does violence to the fundamental principles upon which the security of the Nation depends. Freedom of speech and press are not merely the means of permitting a dissident view to express itself; these freedoms are of intrinsic value to the whole of society as the best means of attaining progress in civilized life. The fear of unorthodoxy is incompatible with a strong democracy.

5. Appellant was convicted for mailing a brochure advertising obscene books and for keeping obscene books for sale. The Federal laws cover the entire field of "obscenity in the mails" and the State law, as applied here to appellant's mailing activities is void since it infringes on a sphere of activity reserved exclusively to the Federal government respecting which the Federal government has fully legislated.

I.

The California Penal Statute Enacts Standards Proscribing "Obscene" and "Indecent" Books and Writings Which Permit the Abridgement of Freedom of Speech and Press and the Censorial Proscription of Thoughts, Beliefs, Ideas and Opinions Expressed in Works of Art and Literature. The Incomprehensible and Indefinite Provisions of the Law Permit Retrospective Conviction Without Rules or Standards of Guilt to Guide an Accused or a Court and Jury. The Statute, on Its Face and as Construed and Applied to the Appellant, Deprives Appellant of Substantive and Procedural Due Process of Law, All Contrary to the First Amendment and Due Process Clause of the Fourteenth Amendment.

A. The Issues Within the Statute's General Frame of Reference.

We have divided the brief into two points. The first point here deals with all due process questions; the second point, with the issue of Federal preemption. Since "indefiniteness" is entwined with "free speech" in this case, we discuss both questions under the first point.

The first point is divided into four sections. The first section here is devoted to an analysis of the free speech and due process questions, in their broad aspect. The attempt is to delimit the issues, both as to what is and what is not involved in this case. The second section is concerned with the impossibility of identification of the words "obscene or indecent" in the light of the constitutional requirements of due process. The third section is devoted to the discussion of the fundamental issues

of censorship and freedom of speech and press. The fourth section describes the universal importance of the societal values of freedom of speech and individualism.

1. The Scope of the Statute.

(a) The statute applies to all writers, composers, printers, publishers, sellers, distributors, exhibitors, designers, painters and other persons similarly situated.

(b) The statute affects all writings, papers, books, pictures, prints and figures, and advertisements thereof.

(c) The focus of the statute is on the "reader." The crime is "mental obscenity." The issue is the effect of the book or other writing or art work upon the mind of the reader or viewer.

(d) The statute does not purport to limit the statute to any class of readers or viewers. It covers, therefore, all adults, "normal" or "abnormal"; all children, "well adjusted" or "delinquent."

In short, this statute within its terms is limitless in scope, both in operation and effect. It is probable that the State will concede that this extended coverage is precisely the purpose and intent of the "obscenity" statute.

2. The Object of the Statute.

The statute contains only one stated objective. As construed by the state court, the statute is concerned solely with the emanation and dissemination of books which have "a substantial tendency to deprave or corrupt [their]

readers by inciting lascivious thoughts or arousing lustful desire."[2]

It is important to emphasize that this is the sole stated objective of the statute. The statute does not purport to impose criminal sanctions for the writing or sale of books which cause the commission of crimes against persons, or which directly and purposefully incite thereto. Since incitement to criminal conduct is not the punishable offense under this statute, the question of the causal relation between the reading of books and the commission of acts in violation of the criminal code is not directly presented here, although we treat the matter in subsequent discussion.

The sole aim of the statute on its face, and as construed and applied by the court below, as aforestated, is to punish the inculcation of "lascivious thoughts and l. tful desire"—as thoughts and desires—in the minds of readers of books, papers, or other writings. The law stops at this point. The clear purpose, therefore, is the preservation and maintenance of "sexual purity" in the thoughts and desires of the members of the community. The State has undertaken to decide not only what shall constitute the "law-abiding citizen," but the "virtuous mind" as well.

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[2] ". . . the book is within the statute if it contains prohibited matter in such quantity or of such nature *as to flavor* the whole and impart to the whole *any of the qualities mentioned in the statute*, so that the book as a whole can fairly be described *by any of the adjectives or descriptive expressions contained in the statute*. The problem is to be solved, not by counting pages, but rather *by considering the impressions likely to be created.*" (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962, 178 P. 2d 853 (1947) (emphasis supplied).)

3. THE CONSTITUTIONAL AND LEGAL QUESTIONS INVOLVED, AND THE SUBSIDIARY ISSUES RAISED THEREUNDER.

In broad contour, the issues raised here may be briefly stated: Does the statute, as construed and applied, abridge freedom of thought and expression to an extent forbidden by the provisions of the First and Fourteenth Amendments?[3] Do the standards set by the statute constitute a censorial proscription of ideas and speech, as violative of the constitutional provisions as the statutes invalidated by this Court in *Thornhill v. Alabama*, 310 U. S. 88, and *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870, to cite only two examples? Are the standards created by the statute so inherently meaningless as to offend the procedural due process provisions of the Fourteenth Amendment?

Questions such as the aforesaid reflect, however, deeper issues of constitutional importance. Each of these subsidiary issues, standing alone, may or may not be decisive for adjudication, but each is relevant for a delineation of the legal issues which a statute such as the one here involved creates.

(a) Legislation which sought to command adherence to a particular religious or moral tenet would appear to be constitutionally impermissible. The coercion of uniformity of sentiment, the prescription of what shall be orthodox in religion or morals as a means of "saving

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[3]It is not solely literature dealing with sex that the statute interdicts. It is any writing which stimulates "impure" sex thoughts and desires. Given the objective circumstances, a learned jurist believes that even the "Mechanic's Lien Act" may initiate a train of thought that the statute is intended to prevent. (*Commonwealth v. Gordon*, 66 D. & C. 101, 137 (Pa., 1949).)

souls" would invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 640, 642.) If a State cannot commend adherence to a particular moral precept, can it nevertheless make the inculcation of any other moral tenet a penal standard with the risk of fine and imprisonment for disobedience? It is submitted that such indirect and subtle encroachment upon liberty of thought and intellect cannot be supported. The State does not appear to have power to command "sexual purity" in the minds of its citizens, nor, it is submitted, the power to interdict books voluntarily read by citizens which may arouse anything but "sexually pure" thoughts and desires. In the area of sex thoughts and desires, citizens should have the right to be their own private selves and to be let alone.[4] We speak here of this statute, a statute for adults.

On the other hand, a different question of "state power" is presented in such cases as those typified by *Chaplinsky v. New Hampshire*, 315 U. S. 568. There the statute, narrowly construed by the state court, was limited to conduct which directly provoked the person against whom it was directed to acts of violence. It was specifically

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[4] "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." (Brandeis, J. in *Olmstead v. United States*, 277 U. S. 438, 478.)

held that the word "offensive" in the statute was "not to be defined in terms of what a particular addressee thinks." (*Supra*, at 573.) The words in the statute were construed to apply to "disorderly words, including profanity, obscenity and threats" which had the characteristic of "plainly tending to excite the addressee to a breach of the peace." (*Supra*, at 573.) There is a vast constitutional abyss between conduct which immedately incites to a breach of the peace or the commission of crimes, and writing or communication which does no more than incite thoughts and arouse desires. Moreover, it is one thing to say that nobody should force disorderly words or conduct upon an unwilling recipient, to the latter's injury and outrage. It is quite another thing to say that an utterance cannot be communicated to recipients willing to receive and think about it. The reading of books is voluntary.

(b) Another broad issue which appears to intrude into the confines of the discussion here is the question of "prior restraint" vs. "subsequent punishment." Is the distinction of constitutional significance in a consideration of the validity of an "obscenity" statute as construed herein? Put another way, if the State may not validly restrain initially the communication of an idea which "incites to lascivious thoughts and arouses lustful desire," may it nevertheless punish all connected with the idea after the idea has been communicated—and this, although the idea in its outermost boundaries has gone no further than the mind of another? It is submitted that any attempt to draw distinctions in the aforesaid limited area rests upon a basic misconception of the historical, social and legal concepts of censorship.

Censorship is a conscious policy of restricting the public expression of ideas. It is aimed at restricting their being even mentally entertained. It may be exercised by the political or by the religious authorities, or even by private groups. The scope and method of censorship may vary, but its principal purpose is always allegedly to protect the governing authority or the social or moral order which authority considers itself bound to protect.

> "Censorship may take the form of an examination of material in advance of publication and its suppression if disapproved. This is known as preventive censorship, in contrast to punitive censorship, which inflicts penalties after the offense and seeks to destroy the offending material. The censorship of antiquity was punitive, while that of the mediaeval church and of early modern times was in general preventive." (Harold D. Lasswell, III *Cyc. of Soc. Sci.* 292.)

In England, during the seventeenth century, as Blackstone informs us, the government there abandoned the preventive censorship of printing and began the punitive. But that form of censorship was not made a part of the American governmental system.

> "The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication." (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 572, n. 3.)

> "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641.)

To paraphrase what this Court has stated at different times, the very purpose of the First Amendment was to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion; it rests on the assumption that the widest possible dissemination of information upon all subjects from diverse and antagonistic sources is essential to the welfare of the public. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets the United States apart from totalitarian regimes. The exercise of freedom of speech and of press lies at the foundation of free government by free men, since free discussion of the problems of society is a cardinal principle of Americanism, and the vitality of civil and political institutions in our society depends on such discussion.

Freedom from all governmental censorship, prior or subsequent, is therefore the fundamental rule in our constitutional system. Most censorship operates through the instrumentality of arbitrary and vague, indefinite standards prescribed by the Censor himself. This is the grossest vice. The Censor then has plenary power to determine "permissible" expression. Such power is denied under our law in all postures of the case and in all guises.

The confusion which sets in in this area, it is respectfully submitted, is the failure to distinguish between the right to exercise freedom of speech and press and the state's power to punish utterances which directly coerce and incite to acts injurious to other persons. Where the expression of ideas are involved, "previous restraint" is impermissible, but "subsequent punishment" for coercive incitement of unlawful acts may be imposed. This will

explain the seeming anomaly between provisions in state constitutions guaranteeing freedom of speech and press while holding persons responsible for "abuse" of that right, and Madison's statement with respect to the freedom of the press that

> "it has accordingly been decided, *by the practice of the states,* that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits." (*Report on the Virginia Resolutions* in 4 Elliot's Debates 571.) (Emphasis supplied.)

The statute here is not a "conduct" statute. It is a statute which avowedly deals only with the communication of ideas from one person's mind to another person's mind. The issue here is whether the statute is a censorship statute. Appellant submits that the determination of the validity of the statute cannot be beclouded by arguments concerning the relative merits of "preventive" censorship as contrasted with "punitive" censorship. Freedom cannot be indivisible if censorship is divisible. For the aforesaid reasons, we devote our discussion in a subsequent section of this brief principally to the basic issue of whether the statute here permits the arbitrary control by government of ideas and their expression contrary to the essential purposes of the First and Fourteenth Amendments to the Constitution.

(c) We turn now to another issue lying beneath the broad constitutional questions presented here. That issue revolves around the constitutional protection afforded to utterances which are allegedly "no essential part of any exposition of ideas" or of ideas that are assumedly "of

slight social value as a step to truth." Since these are the labels normally attached to "lascivious thoughts and lustful desire," we treat the matter fully in our subsequent discussion of the free speech and press aspects of the statute herein. Some general considerations may be noted here.

In the first place, it has been held by this Court in a number of cases[5] that a statute is void on its face, irrespective of its application in a particular case, where it does not aim specifically at evils within the allowable areas of state control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press, and hence operates as an overhanging threat to free discussion. A statute is invalid on its face if it is so vague and indefinite as to permit the punishment of the fair use of the right of free speech, or where the sweeping and inexact terms of the statute disclose a threat to freedom of speech inherent in its existence. In other words, a positive law which can be used by officials of government to abridge freedom of speech and press does not avoid the condemnation of the Constitution because the statute might only be used in cases where speech is assumedly not protected. A contrary rule would open the doors wide for the suppression of ideas because of the overhanging threat of arbitrary governmental action.

It is appellant's position that the statute here is plainly violative of the above principles and is no different in essence and character from the statutes previously invali-

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[5]See, *Thornhill v. Alabama*, 310 U. S. 88; *Bridges v. California*, 314 U. S. 252; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Carlson v. California*, 310 U. S. 106.

dated by this Court as aforementioned. The statute, as we shall endeavor to demonstrate, is so broad in scope as to permit a limitless inhibition of speech and press. Consequently, we do not actually reach the question of "particular application."[6]

Nevertheless, it is relevant to our discussion of free speech and censorship in relation to the "obscenity" statute here to treat the question of the power of government in the "hard core" area of ideas allegedly containing "slight social value." We consider the "hard core" argument in the field of "obscenity," with all due deference to those who press it, as reducible ultimately to but another ambiguous standard working similar ambiguous abridgement of speech and press. It is an epithetical argument, an argument which proceeds by "knowing look" and "sly wink" to assert that "we are all certain" that there are some "obscene and indecent" books which are worthy of the bonfire only.

The denotation of "hard core obscenity" requires answer to two questions: Who says so? How can you be "certain" that the particular utterances are "hard core obscenities" with no value to society? It is, of course, commonplace, that in the realm of discussion between citizens, "the tenets of one man may seem the rankest error to his neighbor." (*Cantwell v. Connecticut*, 310 U. S. 296, 310.) Argument and debate may include exaggeration and vilification. Thus, it is possible that an idea may be ter[illegible]d

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[6]There is, however, no concession here that the writings which resulted in the conviction of appellant were "obscene and indecent" as defined by the court below. The appellant continues to assert that all the literature used at the trial against him was protected from governmental interdiction by the provisions of the First and Fourteenth Amendments.

"obscene" or "hateful" or "distasteful" as it seeks acceptance in the marketplace of ideas. This is the gamut which the idea must regrettably run, and so long as the people themselves are debating the matter and deciding the issue, the idea must accept the brickbats as well as the accolades.

A quite different situation is presented when the government enters the arena of debate and silences the utterance because it is "obscene." Citizens can no longer determine for themselves whether their own ideas of morality are valid, or merely the result of prejudice. They can no longer distinguish between truth and falsity, nor synthesize the best of their own ideas with the best of others. They are no longer adults in a self-governing society, but infants whom the government is afraid to trust. Imitation and conformity replace spontaneity and diversity.

That is why in the area of "hard core obscenity" it is important first to determine who is making the decision and how it is being made. The State's power only begins when the idea directly coerces conduct which immediately injures others in the community. It is not the function of the State to punish the incitation of *thoughts* or the arousal of *desires*, be those thoughts or desires denominated "bad," "hateful," "lascivious," "lustful" or whatever. So long as the idea does not advocate or incite to acts of wrongdoing, so long as its recipients are free to accept or reject it, so long as the idea remains depictive, expositive, discursive, or representational, so long as the idea remains subject to the cogitation of the mind, it is free from governmental power of abridgment—"hard core" or not. That at least has been the theory of our legal system since the colonists parted company with

King George and the "common law of England." The "law" in the United States is as indifferent to the subjects of writings as it is to the "flavor" of its contents.

> "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbors to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." (Jefferson, *Notes on Virginia* in *Works* (Fed. Ed.), Vol. IV, 78.)[7]

How certain can we be that an idea has "no social value as a step to truth," that the idea is solely and truly "hard core obscenity?" Judge Hand once observed that "the spirit of liberty is the spirit which is not too sure that it is right," and stated on another occasion:

> "How tentative and provisional are our attainments, intellectual and moral; how often the deepest convictions of one generation are the rejects of the next . . ." (Quoted in Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 180, n. 54.)

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[7]It is sometimes urged in support of these "obscene thoughts and lustful desire" statutes, that the writings, having succeeded in inculcating "bad" ideas, may prompt the readers to take unlawful action. Aside from the fact that the statute here does not even purport to make the resultant conduct an ingredient of the offense, there is a constitutional distinction between the utterances of ideas which may prompt readers to take unlawful action, and advocacy and incitement that such action be taken. (*Taylor v. Mississippi*, 319 U. S. 583.) The difference is between the exercise of reason before action is taken and unreasoned action compelled by coercion. There may be of course "psychopathic personalities" who have lost the power of reason and control of their conduct. A statute which limited the furnishing of books to such defined persons without a doctor's prescription might raise another question. That is not the statute here. It is doubtful that a free press can flourish when measured by the standards of a "sick mind".

Jefferson stated:

> "Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons." (*Notes on Virginia, supra,* 79.)

The logic of history is that the most uncertain question in the world is whether an idea is "good" or "bad," whether it has "social value" or not. That is why there is so much danger to the public welfare in ticketing or labeling ideas as "very obscene," "moderately obscene," or even "pure."[8] The notion that the earth was not the center of the universe was "hard core obscenity" in Copernicus' time. Today we know that that was the "purest" of ideas and of inestimable value to the progress of civilization. Galileo thought the earth was round but very few persons in his time thought that such "madness" was a socially useful idea. It was not long ago that any discussion of the causes and cure of venereal diseases was stamped as blatant "obscenity" and men went to jail for expressing such ideas.

The fact is that too often the measure of what ideas are "socially useful" is based on the limits of one's own knowledge, one's own perceptions, senses, passions, prejudices or recollections. In every field, science as well as the arts and literature, men's minds are touched by what seems to some of them unknowable or untouchable, or which recalls to them what they would keep beyond recall. Ideas of great value, or crude ideas upon which others might later build significant contributions to mankind, are

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[8]See the prosecutor's "Analysis of Exhibits" below [R. 13-14], and the Answer to the Analysis [R. 14-18].

thus relegated to oblivion as "obscene" or "socially useless." The most "obscene" utterance may sometimes mirror the most significant social, scientific, political, economic, moral or aesthetic problem which cries for discussion.[9]

(d) There are also corollary issues in the field of procedural due process which require some prior analysis. This is a criminal statute we are discussing; not the "rewards of virtue" nor the "wages of sin." Citizens are being fined and imprisoned here under a purported law, and stamped with a stigma more difficult to erase than some of the most heinous offenses. The sanctions imposed by private organizations upon their members for violations of self-imposed "sex codes" are not in issue. We deal here solely with the attempt of a State in our constitutional system to impose criminal penalties upon those who write, sell and distribute books which engender "lascivious thoughts and lustful desire" in the minds of members of the community.

It is quite true that we argue issues of "indefiniteness" and "vagueness" here, both as a matter of procedural and substantive due process. But in a more profound sense, we urge that conviction here has been obtained under no "law" at all. What this purported statute does is to authorize the punishment of "socially undesirable conduct"

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[9] "For communities and cultures which project an ethic of racism as the necessary consequence of 'the laws of nature and of nature's God' censorship of the arts presents no ethical problem. If the arts communicate disapproval of racism, if they tend to reinforce deviations from racism intrinsic to 'public morals', then the censor must forbid and punish them. . . . To show that colored and white children could freely and happily play together is to be 'guilty of 'obscenity' and 'indecency'." Kallen, *The Ethical Aspects of Censorship* in 5 Social Meaning of Legal Concepts 34, 58 (1953), published by New York University School of Law.

by any measures which a court and jury may deem "good" or "proper." The first principles of legality are violated here. "The essence of this meaning of the principle of legality is limitation on penalization by officials, effected by the required prescription and application of *specific rules.*" Hall, *General Principles of Criminal Law* (1947), 19. The important signification of the principles of *nulla poena sine lege* and *nullum crimen sine lege* is manifested in the requirements that no person shall be punished except in pursuance of a statute which fixes a penalty for criminal conduct; that there be specific legal definition of criminal behavior and barring judicial expansion of the defined criminal behavior-circumstances; and that penal laws shall not be given retroactive effect. (Hall, *supra,* 19-32.) It is appellant's position that these principles are fundamentally violated here, and that he has been denied their equivalents embodied in the due process provisions of the Constitution.

(e) On the basis of the aforesaid, certain issues mooted in the *Winters'* majority and dissenting opinions do not appear apposite here. For example, this statute does not purport to punish incitement to *crime.* It reaches at most incitement to thoughts and desires. If a statute should punish incitement to acts and crimes, an issue might arise as to whether certain utterances are included within the proscribed area.

That is not the situation here. It is not conceded, and no one can seriously contend, that a State ordinarily—if indeed, ever—has the power to intrude into the subjective area of *thoughts* and *desires.* We do not begin here with a conceded power, but rather with the attempt of a State to carve out an area of control from a domain normally,

if not always, free from all governmental intrusion under the Constitution.[10] When the State makes such attempt, it is not a question of "policy" which is involved, but a question of "power." And before there can be any intelligent discussion of "power," there must first be at least a very clear delineation of the area which the State proposes to remove from constitutional protection—very clear, indeed. That has not been done in this case. There is simply no way of objectively determining what book under what circumstances will "incite lascivious thoughts and arouse lustful desire" in the "normal" reader, as distinguished from boredom, laughter, disgust, revulsion, pity, sorrow, disappointment, anger, elation, joy, etc., etc. We await with interest, moreover, respondent's view of what is a "lascivious thought" or a "lustful desire." Is it every thought of sex? Is it every thought of propagating the sexual act? Does it include every thought of the process of love, or "the ways of a man with a maid?" We are embarked here on an uncharted sea of subjective prejudice and idiosyncrasy, an insubstantial basis, it is submitted, for the State's claim to control an area ordinarily enjoying the protection of the Constitution. It is for these reasons we assert that the aforementioned "policy" question involved in *Winters* is not involved here. We add, of course, that if, as a matter of precedural due process, "lascivious thoughts" and "lustful desires" can

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[10] "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." (*Cantwell v. Connecticut*, 310 U. S. 296, 303.)

be isolated and defined, we would assert that such thoughts and desires are nevertheless free from interdiction by the State, as a matter of substantive due process.

(f) Another "policy" issue in the area of "indefiniteness" is not involved here, it is respectfully submitted. No question of "permissible uncertainty" arises. A State may wish to punish conduct marked by variations in human activity. Two recourses appear open: the State may specify each variety of the conduct sought to be punished, leaving to subsequent legislation other varieties which may appear; or it may choose to punish the form of conduct generally, deeming it within the province of "common knowledge" that the varieties of such misconduct are easily known and ascertainable. In the latter case, the citizen is left with the duty of "estimating rightly" that his own conduct may be encompassed by the statute. That there are danger to the liberty of a citizen in such general legislation, and opportunities for arbitrary governmental action, can hardly be denied. Still, it has been urged, that deference is due the legislature by the courts, at least to the extent of permitting the legislature to choose one "policy" or another of bill-drafting. It is customarily urged that in theory, the State denies due process in neither case because in both cases a definable area has been marked out or is readily ascertainable. Since these statutes are coupled usually with requirements of specific intent to commit the unlawful conduct, the risk of convicting the innocent or abridging constitutionally protected speech and press is deemed reduced to a minimal.

No such issue of "permissible uncertainty" is even reached here. The statute here, even were it a conduct statute, has the fatal defect of uncertainty in the terms

of its condemnation, in the want of definiteness in what the law prohibits at all. It is not merely a question of uncertain application or outcome in particular cases. There is no forewarning at all. There is no "common understanding," no "past usage," no "dictionary definition," no body of "judicial precedents" nor "historical precedents," no body of "scientific principles"—which can guide persons in determining what is a "lascivious thought or lustful desire," or what book will engender such thoughts and desires. If a person examines the past, or consults the present, he will only learn that nothing is more uncertain than the meanings of "obscene and indecent," of "sexual impurity," of "lascivious thoughts and lustful desire."

In *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223, invalidating as offensive to due process a vague anti-trust proviso, Mr. Justice Holmes stated:

> "We regard this decision as consistent with *Nash v. United States*, 229 U. S. 373, 377, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restaint of trade. *That deals with the actual, not with an imaginary condition other than the facts* . . . The conditions are as *permanent* as anything human, and a *great body of precedents* on the civil side coupled with *familiar practice* make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them *to guess* on peril of indictment what the community would have given for them if *the continually changing conditions* were other than they are, to an *uncertain extent*; to *divine prophetically* what the reaction of *only partially*

> *determinate facts* would be upon the *imaginations and desires* of purchasers, is to exact gifts that mankind does not possess." (Emphasis supplied.)

The statute herein is not a *Nash* statute. It does not deal with "the actual," but solely with the "imagination." We deal here with nothing tangible or permanent; only the thought processes and desires of a human being are involved, the most changing and impermanent things in the world. There are no body of precedents, and in the nature of things there cannot be. The contents of books are as variable as men's appearances—and the judgments upon them almost as variable, if history furnishes any clue. This statute calls for "prophecy" as to what the reaction of indeterminable facts will be upon the thoughts and desires of purchasers of books. It exacts gifts which mankind does not possess, mankind including, of course, trial courts and juries.

(g) It has been urged that it is not unfair to require persons to estimate the impact of the contents of a book on the mind of the "normal sensual man," that there is no less due process in such cases than in ordinary criminal cases where a man's state of mind must be proved, or in civil or criminal cases where conduct is measured by the standards of the "reasonable man." Such arguments do not "hold water." When we speak of proving the "state of mind" of a person we are usually referring to the state of mind of an accused charged with specific wrong conduct. It is from objective circumstances and the actions of the accused that his state of mind is inferred. (*Cf., American Communications Association, C.I.O. v. Douds,* 339 U. S. 382, 411.) "

But here, the issue affects the state of mind of a hypothetical man who never even appears at the trial as a witness for the prosecution. It is the book alone, "judged by its contents" (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962, 178 P. 2d 853) which serves as the prosecution witness. What the trier of the facts must therefore do is to guess or conjecture a set of circumstances surrounding a hypothetical person, and then infer an hypothetical sensual "state of mind" from the hypothetical set of circumstances, after which the inferred hypothetical state of mind is imputed to the hypothetical "normal" reader. All of this an accused under this statute is required to estimate correctly. It will be observed that in truth the accused is asked not to estimate how one "normal sensual man" will react to a book, but how twelve different "normal sensual men and women" will react. Of course, the accused eventually obtains that knowledge after verdict, but it is difficult to see how conviction has been obtained by due process of law under such circumstances. Whether the jury goes through the aforesaid ratiocination or merely votes its own moral idiosyncrasies is not free from doubt.[10a]

It is quite true that the law often requires persons to measure their conduct by the conduct of the "reasonable man." But it is a reasonable man's *conduct* which is the focus of scrutiny. It is the objective, perceived facts which men have seen occur over and over again that

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[10a] Commenting on the power vested in triers of fact, and the possibility of abuse, Chief Justice Hughes once observed that there might be the temptation to say: "'Let me find the facts for the people of my country, and I care little who lays down the general principles'". Quoted in *United States v. Forness*, 125 F. 2d 928, 942 (C. A. 2, 1942).

merge into the standard which guides reasonable men. Drunkenness arrest the limbs; driving into a crowded street at 70 miles per hour injures and kills; and lighted matches in a pile of papers cause fires. These phenomena occur with such uniformity that all are presumed to know the reasonableness of avoiding such conduct. What is involved here is solely the workings of the mind. What does a normal sensual person "think" when he reads a book? There is no objective experience, no synthesis of experience, to which one can turn in such circumstances. The "normal sensual man" is not only a hypothetical person; he cannot even be hypothesized.

In sum total, the statute here violates the due process provisions of the Constitution in its most profound respects both procedurally and as to free speech and thought. It violates the fundamental tenets that there shall be no crimes without specific laws and that the law shall not punish retroactively. It is the epitome of an alien doctrine that persons may be punished for "socially dangerous" conduct even without specific statute and by standards fixed only by a court or jury. And, it is applied to *books* and *thought*. It is essentially unfair because men can only guess at its meaning. It deprives persons in effect of all essentials of a fair trial—the presumption of innocence, proof of guilt beyond a reasonable doubt, the right of confrontation, the right to furnish evidence in one's behalf, decision by the jury on facts guided by specific standards of law furnished by the court. It permits conviction under a system of *ad hoc* legislation enacted by the judicial arm of government, and this, *ex post facto*. All of this, it should be emphasized, in the area of speech and press where each failure of *the*

judge and jury to estimate rightly may have serious detrimental consequences to the welfare of society.

In concluding this section of the brief at this point, we do not wish to imply that there are no other broad questions which may be germane to the specific issues here. For example, is the issue whether no obscenity statute can be validly enacted, or is the argument solely that the statute here is too broad in construction, and operation and effect, to avoid constitutional infirmity? We would be less than candid if we denied that we believe that all statutes which seek to regulate "sexual purity" in the minds of men offend the Constitution, although we recognize that different problems arise in a statute narrowly drawn, or particularly if narrowly drawn with respect to children who have not yet reached the age of reason. We reach this conclusion principally drawn from the lessons of history. So universal has been the error of censorship in dealing with works of art and literature, and so disastrous the consequences to individuals and to mankind, that we have come to view the type of censorship involved here on the whole as an invalid institution.

There is, on the other hand, sober and respectable opinion which believes that if the interests of the State require some intervention in the field, a statute can be drawn to meet constitutional requirements. They are exemplified by the suggestions of Judge Frank in *United States v. Roth*, 237 F. 2d 796, 825-6 (C. A. 2, 1956) and Judge Bok in *Commonwealth v. Gordon*, 66 D. & C. 101, 156 (Pa., 1949). It will be observed that in all cases the attempt is to draw the statute narrowly and to reach conduct or its direct coercion or incitation, which the State allegedly has a right to prevent, without intruding upon vital areas of freedom of speech and press. Nothing

of the sort has been attempted by the statute here, and it is for this reason that we have foregone any extended discussion of the validity of narrow "obscenity" statutes as contrasted with "no" obscenity statutes at all.

We recognize, also, that any attack upon the validity of an "obscenity" statute may seem to imply approval of "vice" as opposed to virtue, or a disregard of the alleged consequences which follow when the "bars are let down." Much depends here upon the premises with which one builds his arguments. The Platonic creed, upon which many religious systems are built, envisages human nature as perverse and corrupt, given over from its origin to vice and to passion, susceptible to every temptation, incapable of seeking by itself alone the true "moral end" by the right means. Hence a guardianship is required to make man "free" of corruption and temptation. Such guardian, be it church or government, divines the "true" code, and by compelling obedience, "frees" human nature from its corruption into the good and the true. Since the end result is "good and true;" all means, no matter how coercive, appear justified. The artist shall paint only what the depositories of faith ordain shall be painted; the writer shall think and write only what authority deems proper to think and be written. Since there is dogma, it is a foregone conclusion that there will be heresy—"men being what they are"—and this heresy must be relentlessly pursued and extirpated. No one can fail to perceive in some of the decisions in "obscenity" cases, in England and the United States, a reflection of this philosophical spirit.[11]

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[11] This philosophical school is exemplified by the writings of Plato and St. Thomas Aquinas. In Appendix "A", pp. 1-4, attached to the brief herein, we have set forth excerpts from their writings.

There is a different premise, and a different philosophical spirit which also has deep roots in the soil of civilization. Accepting the workings of a Divine Providence, it assumes that the diversities of mankind in their faiths and ways equally reflect such Divine workings and have equal value for men's personal lives and society. Public morals are built upon the private conscience, the integrity of which is accepted and cherished. It assumes the native goodness and natural rightness of the human person. Beauty, morality and truth are held insured only if there is equal liberty for different persons with their different faiths, their different thoughts, their different arts. The only public morality becomes the substitution of freedom for authority. Government, under such philosophy, exists by "consent of the governed"; a free press should be its censor, stated Jefferson. He added:

> "What has been the effect of coercion. To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth . . . if a sect arises whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the state to be troubled with it." (*Notes on Virginia, supra,* 80.)[12]

An attack upon the constitutional validity of an "obscenity" statute is therefore not a plea for "licentiousness." It is rather a defense of and dedication to the public morality upon which the Constitution and self-governing society of America were founded. In this country, we have

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[12]In Appendix "B", pp. 5-14, we have set forth excerpts from the writings of Milton, Locke, Montesquieu, Giblon and Mill which reflect the democratic view that control of moral virtue is a province of the people and not of the State.

separated Church and State. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." (*Watson v. Jones,* 13 Wall. 679, 728.) We deny nothing here to what belongs to the State, its power to regulate conduct which objectively and directly injures members of society. We affirm merely that in the sphere of the intellect, in the realm of ideas, opinions, conscience and thoughts, citizens are freed from the yoke of authority. The State here has stepped over the line and invaded rights which rightfully belong to the people only. Whether the people will make a proper or improper use of their rights is always a gamble, but the democratic system stakes its existence on the belief that the gamble will turn out all right. Contemporary history indicates that those governments which do not hold to such belief are slated for "decline and fall."[13]

From all of the foregoing, it would appear clear that no issue of "state's rights" can be appropriately raised here. This, for two reasons. In the first place, the State is always free to deal with speech and writing which directly and externally injure persons—the uttering of slander and libels upon individuals or the coercion and incitation of acts condemned by law. "Public morality" and "public decency" can thus be protected. In the second place, neither the states nor the Federal government enjoy the "right" to offend the provisions of the Constitution. Neither is above the fundamental law. In upholding the

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[13]"The great Victorians have fixed perhaps forever in the popular mind a false picture of the decline of Roman grandeur in terms of moral decadence, and we hear much of the orgies of the Emperors, but little of the territorial and military factors in the decline of Rome. Such flattering perversion of history is really obscene." (Ernst and Seagle, To The Pure . . . (1928), 283.)

Constitution, this Court does more to preserve "state's rights" than those who invoke the doctrine whenever a claim of Federal right is denied.

We have thus attempted to delimit the issues which arise in this case. The effort has been to make clear what is in the case and what is not. In approaching now a consideration of this specific statute, we recognize that it is an "old law." It is not necessary, it is respectfully submitted, for appellant to argue that an "old law" is not *per se* a constitutional law. There are ancient laws dealing with crimes like theft, larceny, murder and other related offenses which by constant application have led to a body of judicial precedents, so uniform in decision, as to furnish one indicia of their constitutional validity, at least when due process is in question. But the construction and application of this statute as it presently appears has been sparse. It first received its present construction in 1947. (*People v. Wepplo*, 78 Cal. App. Supp. 2d 959, 178 P. 2d 853.) Moreover, the construction and application of "obscenity" statutes has not lead to uniformity, but to wide disparity and confusion. Antiquity has its value for the present age insofar as it has wisdom to impart; we are not required to take the dross along with the gold. Indeed, very little progress could be made if we did. Long judicial confusion is not a pillar of constitutional interpretation. Moreover, this is a "speech" statute and much water has flowed under the bridge since the mid-Victorian days. From the decision of this Court in *Gitlow* in 1925 to the recent decisions in *Burstyn, Gelling, Educational Films* and *Holmby*, there has grown a fresher and more concrete realization of the great values embodied in the First and Fourteenth Amendments to the Constitution. The Constitution has been upheld even as

against "old" abuses. (*Cf., Brown v. Board of Education of Topeka*, 347 U. S. 483.)

The present statute is a little Comstock Act. It deserves little veneration on that score. Nor can it be defended on the ground that a State is free to make "any experiments" it wishes. Prudery may be the motivation of any experiment; nothing can be done about that. But when the motive manifests itself in laws, it is the laws which must meet the constitutional test. Experimentations in the economic field or even in the regulation of criminal conduct objectively manifested in overt injury may be permissible under the fundamental law; but "experimentation" in the area of speech and press protected by the Constitution from state infringement cannot be supported.[14] There can be little hope for advance by experiment in the fields of economics, politics, science, arts, literature, morals, or crimes if we "experiment" with less freedom of speech and press. This is a truism which transcends state lines. If the Fourteenth Amendment "does not enact" any particular dogma, neither does it permit the arbitrary punishment of any "heretic" for the violation of dogma established by the State in the area of thoughts and desires.

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[14] "Experimentation there may be in many things of deep concern, but not in setting boundaries to thought, for thought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity." (Cardozo, *The Paradoxes of Legal Science* (1928), 105.)

B. The Identification of "Obscene or Indecent Books" Which Have a Substantial Tendency to "Deprave or Corrupt" Their Readers by "Inciting Lascivious Thoughts or Arousing Lustful Desire."

We now begin the attempt to "chart the sea" of "obscene or indecent" books. We are to explore the minds and imaginations of men and women. Our compass shows such "constants" as sexual ethics, sexual morals, sexual attitudes, sexual instincts, sexual impulses and desires. We are to determine the "prevalent sex morality" of the community, and to what extent individual readers of books conform to those standards. Do persons come to a book with minds "clean as a sheet of paper"; do they come with thoughts and desires already engendered by the chemistry of the body and early environmental influences; do their thoughts and desires conform with the existing community standards as a whole, if there be such thing; do they instead conform their thoughts and desires to either the existing "sex codes" of the state, or the church, or the family, or the club, or their friends; or do they have their own inner standards which will never see the light of day?

We do not complete our voyage by merely attempting to learn what is a "lascivious thought" or "lustful desire." The statute here requires us also to know when will the contents of a book, as distinguished from other stimuli, incite such lascivious thoughts or arouse such lustful desire. Since we cannot enter the minds of men, it is the external circumstances we must consider: What is the age of the "normal sensual" person? What is the sex of such person? What is the economic, social, religious, educational, marital, psychological and physiological, national and cultural backgrounds of such a person? Are

the responses of such person to the reading of a book the same under all circumstances and conditions? Can such matters as these be of "common knowledge"? Are they susceptible of "scientific" proof?

If the "lascivious thought" or "lustful desire" and their stimuli be thus finally isolated and defined, we shall not have concluded our task until we determine in addition when such thoughts and desires have a "substantial tendency to corrupt and deprave" the readers. Our problem is really the determining of when a "good" man becomes an "evil" man by reading books. There are even some philosophers who quail at answering this question. The road from a book to a "lascivious thought" to "substantial depravity" is a thorny one for scientists as well. The difficulty appears to be that there is nothing more variable than the mind of a human being living in a rapidly changing world of variable influences. Men do not become "evil" simply because "bad" thoughts have become imbedded in their minds. Early training and habits, maturing ethical concepts, social and religious restraints have marked influence in keeping men on the "straight and narrow." Moreover, at any given time, it is impossible to determine whether the reading of books has "substantially corrupted" a man, or whether his home life, his environment, his friends, or the domestic and international news which he hears or reads about every day have not been the principal source of his "depravity."[15] Men and

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[15] "Even if a legal sage arose to define with precision the words 'lewd', 'lascivious', 'filthy', 'indecent', 'disgusting', and 'obscene', the ultimate logic of life would remain. Life itself has deep tendencies both toward elevation and corruption. None can escape such forces from the cradle to the grave." (Ernst and Seagle, *To the Pure*. . . . (1928), 283.)

women appear to be in the process only of becoming "corrupt" or "noble" every moment of the day. Whether at any time they have actually reached one stage or another apparently can be answered by posthumous history only.[16]

1. "Common Understanding" as a Guide.

It is assumed by censorial bodies that everyone knows what is "obscene and indecent," or what a "lascivious thought and lustful desire" are. If this be so, the verbalized definitions appear strangely lacking in clarity. Reduced to their essence they are but tautologies, no more.

In 1911, the *Encyclopedia Britannica* told its readers that the meaning of "obscenity" was "decidedly ambiguous." In 1953, in the latest edition of the same compendium, the editors could only say: "'Obscene' is legally defined in the courts as 'tending to stir the sex impulses or to lead to sexually impure thoughts.'" *The Encyclopedia Americana* (1954), states that "a publication is obscene if it is likely to corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall." The editors add: "The criticism has been made that many works of medical or sociological importance have been kept from the market owing to the legal contention that they violate the laws

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[16]In Appendix "C", pp. 15-31, we have set forth some material on this issue. The writings of William James and Sigmund Freud indicate how complex is the cogitation of the mind and the thought processes. The writings of Weston La Barre and Dr. Albert Ellis indicate the ambivalence of sex attitudes in society. The report of Dr. Marie Jahoda and her associates shows how impossible it is to ascertain what books are responsible for erotic thoughts or the cause of sexual conduct. Theodore Schroeder discusses the constitutional infirmity of a criterion of guilt based on the psychological tendency of expressions contained in books.

pertaining to obscenity." *The New International Encyclopedia* (1924), defines "obscenity" as "conduct or published writings which have a corrupting or depraving effect on the public morals." The editors add: "There is just ground for criticism in the unintelligent and illiberal spirit in which these laws are often applied by courts and juries. . . . ." The *Columbia-Viking Desk Encyclopedia* published by the Columbia University Press (1953), perhaps wisely, omits any definition of "obscenity."

Lexicographers, of course, do the best they can, but they give no aid in determining what is and what is not obscene in literature and art. Webster's *New International Dictionary* defines the word "obscene" as "offensive to taste" or "to chastity of mind or to modesty" or "unbecoming or unseemly." The *Oxford English Dictionary* says: "Offensive to modesty or decency; expressing or suggesting unchaste or lustful ideas; impure; indecent, lewd." The *Universal English Dictionary* says: "Indecent, impure; offensive to morals or modesty"; while Funk & Wagnalls *New Standard Dictionary* defines an obscene publication as "an indecent publication which, whether true or false, tends to deprave and corrupt." "Turning from the modern dictionaries to the works of earlier lexicographers, Bailey's Dictionary gives 'filthy, unclean, unchaste, lewd, smutty'; while the learned Dr. Samuel Johnson's tome has 'immodest; not agreeable to chastity of mind; causing lewd ideas; offensive; disgusting; inauspicious; ill-omened. As synonyms Webster presents 'impure; immodest; indecent; unchaste; lewd.'

Hartrampf lists as alternatives to obscene: 'indelicate, indecent.'" (Scott, *Into Whose Hands* (Lond., 1945), 25.)

Webster's *New International Dictionary* defines "lascivious" as "wanton; lewd; lustful" or tending to produce "voluptuous or lewd emotions." It defines "lust" as a "sensuous desire; bodily appetite; specif. and most commonly, sexual desire, as a violent or degrading passion. Longing or intense desire; eagerness to enjoy." Lascivious is defined in Black's *Law Dictionary* (4th Ed., 1951) as "tending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in sexual relations; licentious," or, "conduct which is wanton, lewd, and lustful, and tending to produce voluptuous or lewd emotions." Bouvier's *Law Dictionary* (Cent. Ed., 1948) speaks of lasciviousness as "that form of immorality which has reference to sexual impurity." The author adds: "Lasciviousness and lewdness are generally treated as interchangeable if not synonymous terms. In both cases the principal use of the two words is now in each case in a secondary or derived meaning. The primary meaning of *lascivious,* from which the first is derived, is sportiveness, and its use in a bad sense is said to be *post*-Augustine, and never by Cicero; the other is derived from the Anglo-Saxon *laewed,* lay or unlearned."

The reason why words like "obscene," "indecent," "lascivious" and "lust" in a statute dealing solely with thoughts and desires cannot be defined other than in tautological abstractions is because the primary words are

themselves abstractions, humors, emotions and moods. The words have as many variable meanings as there are different languages, countries, communities, localities, mentalities, conceptions and temperaments. In the ultimate analysis "obscenity" exists only in the mind of the one who condemns, dependent not on reason but emotion.[17]

2. Stare Decisis in the Area of "Obscenity."

Judge Bok stated in *Commonwealth v. Gordon*, 66 D. & C. 101, 116 (Pa., 1949): "The idea that instinct can be resorted to as a process of moral *stare decisis* reduces to absurdity." Another troubled court stated: ". . . the courts have gone on through the years construing and interpreting the inhibitory words of these statutes generally to agree with their own ideas of what was or was not 'obscenity' in the publication before them . . . [but] how is a court or jury to know if on reading a literary work sex ideas arise in the minds of the readers and, if so, whether they are pure or impure for, according to this test, it is only lustful or impure sex ideas with

[17]The public approach to "lasciviousness" appears so ambivalent as to negate any possibility of "common understanding". A critical student of conflicting sex attitudes in America states that the "typical American male or female has no monolithic sex attitude, but only very pluralistic attitudes. . . . Officially, legally, and traditionally, most of the sex views of our society are negativistic and disapproving, and (consciously) the majority of Americans appear to adhere to these traditional anti-sexual viewpoints. Unofficially, extralegally, and actually, however, the sex attitudes of millions of Americans (and particularly of male Americans) are at least partially positive, approving and pro-sexual." (Ellis, A. E., *The Folklore of Sex* (1951), 273. See Ch. 17, "Lasciviousness", 133-143.)

which courts and juries are concerned." (*State v. Lerner*, 81 N. E. 2d 282, 285-286 (Ohio Comm. Pl., 1948.)[18]

Precedents have value, plainly, only when they bring uniformity and certainty into the law. When, however, the only conclusions one can draw from precedent are of confusion, uncertainty and harsh and arbitrary enforcement of the law, then such conclusions would appear to confirm rather than avoid the invalidity of the statute so far as certainty and freedom of the press are concerned. In an area where history shows each succeeding generation questioning the decisions of the prior generation, while steadfastly maintaining its own as "right"; where each decision virtually deals with a different writing and a different subjective judgment based solely on personal idiosyncrasy, precedent alone would seem to be an insufficient guide. Indeed, it is a strange anomaly in the field of "obscenity" that nothing in the common law or early colonial history suggests that the mere stimulation of "lascivious thoughts or lustful desire" in itself was considered a punishable offense. "Obscenity" was always associated with attacks upon religion (blasphemy) and upon the State (sedition), or linked with incitements

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[18]The same Court added: "Pure, normal sex ideas are all right. All of mankind have sex ideas. Nature is aflame with sex ideas,—the hoot of the owl, the coo of the dove, the blossoms of the flowers, plants and trees, the spawning of the fish. Sex is the why and wherefore of living." *supra*, 286. Quere: May not, however, these written reflections of "pure, normal" sex ideas engender in a reader "lascivious thoughts and lustful desire"?

to a breach of the peace. (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 41; Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938).) It was oddly enough more than "four score and seven years" after the founding of the nation, and after the adoption of the First and Fourteenth Amendments, that "obscenity" statutes and decisions, wholly separated from blasphemy, sedition and conduct associations, began to flourish. The bewildering fact is that the only "certainty" which one can distil out of law and history in the area of "obscenity" is contained in the files of the Watch and Ward Societies and the Legions of Decency. These "precedents" are, however, a principal reason for the invalidity of statutes such as the one here involved.

(a) So far as "common law" or history in general is concerned, we have reserved for the succeeding section on free speech and censorship a particular analysis of the early English cases. So far as the issue of "certainty" is concerned in relation to procedural due process, it appears that the earliest decision on "obscenity" in the English law reports was *Sir Charles Sydles Case*, 1 Keble 620 (K. B., 1663). No question of literary misbehavior was involved.[19] It was not until 1708 that a writing was attacked as an "obscene libel" in the courts. (*Regina v. Read*, 11 Mod. 143 (Q. B., 1708).) This case is some-

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[19] "Inebriated and nude, Sir Charles had exhibited himself on a London Balcony overlooking Covent Garden and had hurled upon the populace bottles filled with an 'offensive liquor,' as judges later delicately indicated, the while he engaged in eloquent blasphemy. From this merry prank, perversely enough, was conceived our present obscenity law, with the sparkling figure of Sir Charles its innocent and unwitting progenitor." (Alpert, *Judicial Censorship of Obscene Literature, supra*, 41.)

times relied upon to show that the circulation of "obscene" literature was a crime at common law, and that "obscenity" meant then what it means now. In fact, the indictment was not sustained. Lord Holt stated: "A crime that shakes religion, as profaneness on the stage, etc. is indictable; but writing an obscene book, as that intitled 'Fifteen Plagues of a Maidenhead' is not indictable, but punishable only in the spiritual court" *supra,* 205. The first case in which an indictment was upheld for an "obscene" writing was *Rex v. Curl,* 2 Strange 789 (K. B., 1727). Curl's writing was an attack on religion. The indictment was sustained because "religion was part of the common law; and therefore whatever is an offense against that is evidently an offense against the common law." (*King v. Curl,* Barnardiston's Report 29.) The only other case, prior to the separation of the American colonies from England, was *Rex v. Wilkes,* 4 Burr. 2527 (K. B., 1770).) The case appears to have been politically inspired, and judgment was actually entered on default after Wilkes fled the country. (Schroeder, *supra,* 38.) Wilkes' "Essay on Woman" impiously interwove the name of the Deity with a description of sensuous pleasures. The judgment of conviction recited: "Being convicted of certain trespasses, contempts and grand misdemeanors, in printing and publishing an obscene and impious libel, entitled an 'Essay on Woman' and other impious libels, etc." (*Rex v. Wilkes, supra,* 2527, 2575.)

These precedents, in sum total, are what constitute the "common law" history of "obscenity." The few cases demonstrate clearly that there was no occasion nor belief that "obscenity" in literature was punishable unless it discredited the established religion, was of a seditious nature, or concerned an individual so as to provoke a breach

of the peace. There was no attempt to define the term "obscenity," nor can any basis for identification be found. Hawkins in his *Pleas of the Crown* in 1795 stated: "However, it seems clear, that no writing whatever is to be esteemed a libel, unless it reflects upon some particular person; and it seems that a writing full of obscene ribaldry, without any kind of reflection upon anyone, is not punishable, as I have heard it agreed in the court of King's bench." (Quoted in Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 40.)

Judge Frank in *United States v. Roth*, 237 F. 2d 796 (C. A. 2, 1956), cert, gr. 77 S. Ct. 361, shows that such leaders as Madison, Jefferson and Franklin could hardly have assumed that it was within the competence of government to enact statutes affecting "lascivious thoughts or lustful desire." Jefferson, in 1805, in his second inaugural address, stated: ". . . the public judgment will correct false reasonings and opinions, on a full hearing of all parties; and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness. If there be still improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion." (*Works* (Fed. Ed.), Vol. X, 135.) Franklin was not only the author of *Letter of Advice to Young Men on the Proper Choosing of a Mistress* and the *Speech of Polly Baker*, but the same frankness permeated nearly all the colonists, whose "bundling" habits appear to have the amused approval of their present descendants. 'Many a library of a colonial planter in Virginia or a colonial intellectual in New England boasted copies of Tom Jones, Tristram Shandy, Ovid's Art of Love, and Rabelais. . . .". (*United*

States v. Roth, supra, 806.[20] It may not be amiss to note, also, that while Franklin's *Speech of Polly Baker* would come within the interdiction of the statute here as "obscenity," still that same "obscenity" had concealed within it the essence of a "pure" thought. Thus, in 1904, the editors of the Works of Franklin (Fed. Ed.) stated in a footnote to *Polly Baker's Speech* (Vol. II, 129): "Two of the more elaborate of Franklin's jokes in the *Pennsylvania Gazette,* says Mr. Parton in his charming biography of Franklin, have escaped the vigilance of editors hitherto. The speech of Polly Baker is one of these; *which is not only humorous, but well rebukes the cruel immorality which sent a poor miserable drab to the whipping-post, and invited her seducer to dinner.*" (Emphasis supplied.) (See also, *"The Drinker's Dictionary," Works of Franklin, supra,* 133-139, and *"On Scandal," supra,* 139-145.)

Thus, neither at common law nor in colonial America was the incitation of "lascivious" thoughts or "lustful" desire by mere writings ever considered a "crime." It was

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[20]Despite the later advent of a powerful vocal Prudery in the 1850's, it should not be assumed that the free colonial spirit can ever be diminished. Silas Bent in his *Biography of Justice Oliver Wendell Holmes* (1932) described the Justice as "more American than most of his contemporaries." (*supra,* 15.) The Justice was a voracious reader: "No notion can be given here of the range of these adventurings; but it may as well be said now as later that he has enjoyed vastly such books as *Nize Baby, Gentlemen Prefer Blondes, Poems In Praise of Practically Nothing,* detective stories and French novels . . . naughty French Novels." (*supra,* 16.) "He used to attend a burlesque house in Washington; and one evening, when the show was a little rawer than usual, which is saying a great deal, he turned to the man on his right, a stranger, and ejaculated: 'I thank God I am a man of low tastes.'" (*supra,* 19.) The Justice also stated: "With effervescing opinions, the quickest way to let them get flat, as with the not yet forgotten champagnes, is to let them get exposed to the air." (*supra,* 6.)

not until the opening of the nineteenth century that prosecutions of "erotic" literature began to take place. Around 1815, Thomas Bowdler began expurgating Shakespeare, and still later there were "sensitive souls who found even Bowdler's Shakespeare a little too frank for their taste." (Ernst and Seagle, *To the Pure* . . . (1928), 110.) It was not until 1857 that Lord Campbell's Act (20 and 21 Vict.) was passed. The Act met great opposition from its very introduction, and the debate on the Act is of great consequence because it indicates "the insoluble enigmas of literary decency." (*Ernst and Seagle, supra* 117; see 146 Hansard, *Parliamentary Debates* (3rd ser., 1857).) The author of the measure affirmed that it was a measure "intended to apply exclusively to works written for the single purpose of corrupting the morals of youth . . ." *supra,* 327. The opponents argued that such an interpretation would seriously restrict the circulation of the press. The Lord Chancellor himself stated: "Who could tell that the superintendent of police or the magistrates before whom the application came would take a different view of what were obscene or indecent publications from the noble and learned Lord? . . . unless material alterations were made he did not think the measure could fitly become the law of the land" *supra,* 327 *et seq.* (See also, Ernst and Seagle, *supra,* 118-128.) Eleven years later, the predictions of the opponents of the measure were verified. In *Regina v. Hicklin,* L. R. 3 Q. B. 360 (1868), another anti-religious tract "The Confessional Unmasked" was brought within the ban of a statute purportedly enacted to protect "the morals of youth." Disregarding the avowed purpose of the law, and restricted by no specific definition, it was an easy matter for Lord Cockburn to conclude that the reach of

the statute and its test was whether "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall."[21]

This incomprehensible *Hicklin* rule marked the full growth of mid-Victorianism. Eight years later Anthony Comstock fathered the Postal Censorship Law and obtained or inspired passage of obscenity laws throughout the country. No attempt at definition was made in these laws, and the courts were left to make their own construction and application as the "book might be."

(b) If history, therefore, affords no ascertainable meaning of words like "obscene," "indecent," "corruption," "depravity," "lascivious" and "lustful," it may be conjectured that perhaps the judicial application of the "obscenity" laws has led to clearer understanding. As we demonstrated in our *"Further Memorandum Submitted by Leave of Court"* (pp. 12-21), the opposite is the case. "Federal Judge Ernest Tolin, faced with the perplexing question of what constitutes obscenity, decided to consult the settled authority of judicial utterances. His researches were more baffling than enlightening, for in 1954 he discovered fourteen different judicial definitions of the term. 'No one seems to know what obscenity is. Many writers have discussed the obscene, but few agree upon even its essential nature,' complained Professors Lockhart and McClure after completing one of the most exhaustive

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[21]Of this rule, Judge Bok stated: "Strictly applied, this rule renders any book unsafe, since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue." (*Commonwealth v. Gordon*, 66 D. & C. 101, 125 (Pa., 1949).) So far as effect upon the reader is concerned, the *Hicklin* rule is embodied essentially in the statute here.

studies yet made in this field." (Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 59.)

As one reads the cases, the only key to what makes a book "obscene" appears to be the suggestion of impure and libidinous thoughts. It appears to be the view that such thoughts deprave and corrupt the readers. None of the cases declare what kinds of desires, imaginations, impulses, and thoughts are impure, lascivious, lecherous, lewd, libidinous, lustful, obscene, sensual or sexual—all words which appear at one or the other time in the decisions. "Legal authorities, with much wisdom, in the statutes affecting obscenity, have made no attempt to definition. They have been content to leave the interpretation to the judge, the magistrate, or the jury. By this procedure they have avoided the difficulties in any attempt to define, in precise phraseology, what is neither more nor less than a purely emotional concept." Scott, *Into Whose Hands* (1945), 26. "Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation *ad hoc*, like the standard of care." (*United States v. Levine*, 83 F. 2d 156, 157 (C. A. 2, 1936).)

The obscurity which we observe in all the aforesaid is only deepened by a consideration of the interpretation which this Court has given to the constitutional provisions affecting liberty of thought and expression. In *Reynolds v. United States*, 98 U. S. 145, this Court found the "true distinction" to be between "mere opinion" and "actions." In *Grosjean v. American Press Co.*, 297 U. S. 233, and *Bridges v. California*, 314 U. S. 252, this Court emphasized that the "restricted rules of the English law in respect of the freedom of the press" were

never accepted by the American colonists; that the First Amendment was intended to preclude the federal government, and the Fourteenth Amendment, the states, from abridging the freedom of the press. The protection of the right is not limited "to any particular way of abridging it." To allow the press to be fettered "is to fetter ourselves." Time and again this Court has emphasized that the "people of this nation have ordained in the light of history" (*Cantwell v. Connecticut,* 310 U. S. 296, 310), that the liberties of thought, speech and press shall remain unabridged. The suppression of unpopular, annoying or distasteful ideas, this Court has held, "would be a complete repudiation of the philosophy of the Bill of Rights." (*Murdock v. Pennsylvania,* 319 U. S. 105, 116.) Finally, vagueness and indefiniteness in this area have led this Court to strike down statutes with terms of reference like "sacrilegious" (*Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495); "prejudicial to the best interests of the people" (*Gelling v. Texas,* 343 U. S. 960); "effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime" (*Superior Films v. Department of Education,* 346 U. S. 587, reversing decision in 159 Ohio St. 315, 112 N. E. 2d 311, 318); and "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals" (*Holmby Productions, Inc. v. Vaughn,* 350 U. S. 870, reversing decision in 177 Kan. 728, 282 P. 2d 412).

The objective guides of "common understanding" and "precedents" are therefore valueless in determining the scope of the law, either as it affects the freedom to write or the right to be free from criminal restraint under incomprehensible and retroactive statutes.

3. Scientific Guidance in the Search for Certainty.

The question remains whether the empiricism of science can help us identify what kind of a book, if any, incites "lascivious thoughts and lustful desire," and when such thoughts and desires substantially "corrupt and deprave" the reader. We do not debate here any "policy" question as to whether a State could believe that books stimulate to "bad" thoughts or "bad" acts. One cannot assert unequivocally that the reading of a book will never lead to erotic thought or conduct. But an examination of all available responsible scientific data indicates that it is simply impossible to ascertain just what book or type of book will stimulate "lascivious thoughts" in a reader, or cause him to engage in any sexual conduct, lawful or unlawful. It should be noted, however, as an offshoot of this inquiry, that all scientific investigation reveals little basis for the belief that the reading of books plays any significant part in stimulating "sexually impure" thoughts, desires or acts.

As to the meaning of a "lascivious thought" or "lustful desire," we have already indicated that no two persons are agreed. Attitudes appear markedly pluralistic and ambivalent. (Ellis, *The Folklore of Sex* (1951).)[22] One can only guess from the different books held to be "obscene"

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[22] "Do these words embrace thoughts of normal sexual intercourse? If so, within wedlock or only without? Or, on the other hand, do they embrace only thoughts of sexual perversion, including of course the sexual perversion of auto-eroticism in which the reader gains sexual satisfaction solely from reading and not from a live person of the opposite sex? None of the cases give a clear answer to any of these questions." (Lockhart and McClure, *Literature, The Law of Obscenity And The Constitution*, 38 Minn. L. Rev. 295, 330 (1954).)

that any thought of sex is included within the meaning of the words used by the courts. If this be really so, and there is much to support this conclusion, the First and Fourteenth Amendments guaranteeing freedom of thought would make any discussion of procedural uncertainty unnecessary.

(a) Assuming *arguendo* that "lascivious thoughts and lustful desire" are definable, what does science have to say as to the causal relation between books and "lascivious thoughts and lustful desire." Law enforcement officials and private censorial groups do not hesitate to assert that books stimulate "bad" sex thoughts, which thoughts in turn drive persons to "sex crimes." Usually, these claims are limited to children. In any event, it is argued that children and adults are in fact worse today than they used to be as a result of reading books, a thesis not quite acceptable in all quarters. (See, Gellhorn, *supra,* 61, note.)

Not one serious study by any responsible social scientist gives credence to the views of the vice crusaders. As Professor Gellhorn states: "With all respect to those who accept these assertions as self-evident truths, I doubt that the available evidence supports them. I think that they overstate the significance of words and pictures and understate the other elements of life that shape human behavior" *supra,* 61. It is these "other elements of life" which the censors too often ignore.

Even the slightest reflection will lead a dispassionate student to conclude that there is no unifying element in the area of stimuli to men's erotic thoughts. "Not even the sexual element is common to all modesty, shame or indecency. A study of ethnology and psychology shows that emotions of disgust, and the concept of indecency or obscenity, are often associated with phenomena having

no connection with sex, and often in many people are not at all aroused by any phase of healthy sexual manifestation; and in still others are aroused by some sensual associations and not by others; and these, again, vary with the individual according to his age, education and the degree of his sexual hyperaestheticism." (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 274.) In short, a person who reads a book while the phonograph plays "Tristan und Isolde" may dream dreams for which the book is hardly responsible. It has been urged by many responsible persons, borne out by scientific studies, that the presence of the opposite sex is the most overpowering stimulus to sex thoughts and behavior. Books appear to have very little chance against them.

Ernst and Seagle in 1928 detailed the results of a study made by the Bureau of Social Hygiene of New York City working under an endowment from the Rockefeller Foundation, *supra,* 239-249. Ten thousand questionnaires were sent to unmarried women, college graduates. Only 6% of the twelve hundred who replied received *any* sex information from the reading of books. Only 10% received *any* erotic stimulation from the reading of books. The sex information was received from such books as the "Bible," the "Dictionary," the "Encyclopedia," "Shakespeare," "Medical Books" and "Missionary Pamphlet." Stimuli to sex thoughts came from "Leaves of Grass," "Elizabethan Drama," "Literature from Aristophanes to Dante," "Song of Songs," and "Newspaper Reporting," "Stories of happily married people" and "Reading when tired."

Alpert reports another study by the American Youth Commission in Maryland. (*Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 73-74 (1938).)

This involved young people between the ages of sixteen and twenty-four. 13,528 young people were personally interviewed. Only 4% reported that their chief source of sex "education" was from books.

The Sheldon and Glueck study, *Unraveling Juvenile Delinquency* (1950) which made an intensive study of all factors and influences leading to juvenile delinquency does not even mention reading material. Delinquents, as Judge Frank observed, "are far less inclined to read than those who do not become delinquent." (237 F. 2d 796, 813.) Judge Frank also refers to other studies demonstrating "the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society" *supra*, n. 34.

Dr. Marie Jahoda and the staff of New York University's Research Center for Human Relations recently surveyed the available studies in a report entitled *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954): The Report found that "direct experiences have a much greater directive power on human behavior than do vicarious experiences" (p. 23); that "direct contact is a more powerful influence on behavior and feelings than reading" (p. 25); that there is "no evidence for the allegation that criminal acts are likely to be initiated by the reading of 'bad' literature" (p. 27); that "people read what they like, or in other words, what fits their predispositions, personalities and interests" (p. 30); "what a reader gets out of a book is largely determined by what he brings to it" (p. 32); "a conversion of attitudes by any of the mass media is indeed a rare event, if it occurs at all" (p. 44).

The aforesaid demonstrates, it is respectfully submitted, that "obscenity" and "lasciviousness" exist in the minds and emotions of those who believe in it, and it is not a determinable quality of a book. Only a subjective element, variable and immeasurable as to the character of the stimuli capable of arousing it, is the so-called definable area of the statute here involved. The statute truly exacts gifts which mankind does not possess.

(b) As we read the statute here, the plain purport of the statute is to interdict books solely because of sexually impure thoughts which may be created in the minds of the readers. This is emphasized by the construction of the statute by the state court which speaks of solving "the problem" by considering "the impressions likely to be created," the "strong salacious appeal" which causes the book "to be bought and read on account of it." (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962, 178 P. 2d 853.) We do not, therefore, reach the issue as to the scientific conclusions regarding the nexus between books and sexual misbehavior. But it will point up the nebulous character of the statute herein, the dangers to a free press, and the insubstantiality of the evil which the state seeks to prevent, to touch upon this question also.

As our discussion above indicates, there is no support for the conclusion, and no way of knowing, what book will stimulate readers to "lascivious thoughts"; or to what extent these "thoughts" will be opposed or restrained by other "thoughts," fused or canceled out in the process of cogitation; or whether, the entire process of the mind will result thereby in some anti-social conduct. Indeed, it is significant that philosophers and scientists are inclined to question whether such nexus between books and ultimate conduct can ever be made. "The offset-

ting *possibility* derives from the Aristotelian concept of emotional catharsis, shared now by many psychiatrists who believe that aggressions and frustrations that might otherwise flare into overt conduct are not fanned to flame but, instead, are more often dissipated, or at least made temporarily quiescent, by reading." (Gellhorn, *supra*, 64.) "We find it difficult to believe," stated Macauley, "that in a world so full of temptations as this, any gentleman whose life would have been virtuous if he had not read Aristophanes and Juvenal will be made vicious by reading them." (*Works* (1879), Vol. VI, 491.) "Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those who do not, for the reason that such reading often neutralizes what aberrant sexual interests they may have." (Karpman, *The Sexual Offender* (1954), 485.) Dr. Karpman is Chief Psychotherapist at Saint Elizabeth's Hospital, Washington, D. C. (See also, Vedder, *The Juvenile Offender* (1954), 113.)[23]

But if it is impossible to determine the causal connection between "lascivious thoughts" and "anti-social" conduct, it is equally impossible to determine what "anti-social" conduct a State normally would seek to prevent. Since we deal with "sex ideas," assumedly the conduct in question is sexual in nature. Does this include normal intercourse for the purpose of procreation? Within wedlock,

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[23] "It is well, perhaps, to stress that in this branch of the discussion we are indeed talking about abnormal rather than normal psychology. Even if it be true that reading matter may actuate the impulses of some twisted individual, can this possibility justify repressive policies that affect all alike? Should a nation's reading be tailored to fit the extremely uncertain contours of an hypothetical person with a supposedly lower threshhold of resistance than is usual? A program of censorship aimed at that end must prove to be all but limitless. (Gellhorn, *supra*, 65.)

or without? Or is it only practices of sexual perversion? The difficulty here is that many of the sex acts to which sex thoughts can allegedly lead are not offenses at all, or are condoned by a large majority of the community. Also, sex thoughts may plainly lead to marriage, a highly social act or to procreation within marriage, another socially desirable result. "At the present time 11 of the 48 states have no fornication statute, and only 18 punish a single act of intercourse between unmarried persons (four of these by fine alone) . . . American penal laws against illicit intercourse are generally unenforced . . . The reluctance to prosecute finds some justification in evidence that a large proportion of the population is guilty at one time or another of this breach of sexual mores . . . Adulterous relationships are often idealized in literary representations, and are revealed in the intimate biographies of prominent and respected figures . . . Pre-marital intercourse is also very common and widely tolerated so that prosecution for this offense is rare . . . it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions . . . no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." (American Law Institute, *Model Penal Code* (1954), Tentative Draft No. 4, 204-302.)

It is respectfully submitted that this "mental obscenity" statute offends the first requirements of procedural and substantive due process. A prohibition so indefinite and insoluble as to be unintelligible is not a prohibition by which conduct—nor even more clearly speech and press—can be governed. It is not a law at all; it is merely thun-

der and epithet. The arbitrary determination of the trier of the accused, unrestrained and undirected, becomes the sole test of right and wrong. That the pernicious consequences of such a law are not restricted to criminal prosecutions we develop particularly hereafter, but it also is important to recall that "the history of liberty has largely been the history of observance of procedural safeguards." (*McNabb v. United States*, 318 U. S. 332, 347.)[24]

Under a statute such as the one herein, a jury is left to legislate *ad hoc*, or, in other words, to punish retroactively. It is not, however, deciding as it does in negligence cases under a "standard of care." There are objective, certain and constant evidence available in such indeterminable offenses as negligence, drunkenness, breach of the peace and disorderly conduct. There are only subjective, unascertainable factors involved in determining the impact of a book upon the mind of a reader. In *Cline v. Frink Dairy Co.*, 274 U. S. 445, this Court stated: "It is true

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[24]The procedural vice is exemplified in this case. The books were introduced in evidence in groups, and each group given different exhibit numbers. (For a description of the books and their exhibit numbers, see Statement of the Case, *supra*.) After ruling out certain exhibits as "not kept for sale," the trial judge found Exhibits 9 and 11 to be obscene, although "the court has not read all these books" [R. 88]. Exhibits 1 and 5 were held not obscene [R. 88]. On appeal, appellant argued that Exhibits 9 and 11 had not been proved to be kept for sale. Respondent argued that Exhibit 5, which the trial judge had absolved, should be held obscene by the appellate court and was a sufficient basis for affirmance. The appellate court's only reply was: ". . . that some of his books were obscene we do not consider debatable" [R. 21]. Appellant does not know now which "obscene" books led to the affirmance of his conviction, or which books he may sell without subjecting himself to a second prosecution. (*Cf., DeJonge v. Oregon*, 299 U. S. 353, 362; *Cole v. Arkansas*, 333 U. S. 196.) Indeed, the conviction here may well rest upon books clearly protected from governmental abridgement by the Constitution in any view. (*Cf., Stromberg v. California*, 283 U. S. 359.)

that, on an issue like negligence, i.e., a rule of conduct for the average man in the avoidance of injury to his neighbors, every one may be held to observe it either on the civil or the criminal side of the court. It is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist . . . But it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result" *supra,* 464-465. This Court held that the Fourteenth Amendment "requires that there shall be due process of law, and this certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is required" *supra,* 458.

This statute has a greater infirmity than the one found in *Cline v. Frink Dairy Co.,* for it holds the average man to the exercise of a psychological knowledge which no one possesses. It is not a statute which informs those who are subject to it what conduct on their part will render them liable to its penalties. It provides no guide for the judge and jury in the application of the statute nor the attorney defending the accused charged with a violation of the law. It casts a net as broad as all books in circulation and all persons connected with them, and leaves it to the jury to determine arbitrarily who has and who has not offended the law. (*Herndon v. Lowry,* 301 U. S. 242, 263-264.) It is a total surrender of legislative functions to judge and jury. It permits guilt to be inferred without any rational basis for the conclusion. It permits

adjudication outside of "the law" and eliminates any basis for appellate review. It is, in short, that type of *extraordinoria judicia* unknown to the Constitution of the United States.[25] Applied to speech and press, this evil becomes immeasurably compounded.

C. Freedom of Speech and the Press and "Obscene" Books Which Incite "Lascivious Thoughts" and Arouse "Lustful Desire."

We have sought in the previous discussion to bring the pertinent issues arising under the statute here into appropriate focus, and to demonstrate the utter indefiniteness and incomprehensibility of the terms "obscene and in-

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[25]California does not accept "sincerity of purpose" or the opinion of "literary critics". "Literary merit" is also not a criterion. (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962-3, 178 P. 2d 853.) The courts purport to avoid the doctrine of "strict liability" in these cases by requiring proof of a "lewd" intent. It is an intent inferred merely from knowledge that the book is "obscene". This knowledge is assumed if the book bears "marks or indications of its character on the outside", or bears a "title enlightening or even suggestive on the subject." (*Supra*, 966.) Knowledge and intent are thus inferred from the accused's awareness in any form of the title or contents of the book. Since the statute sets no ascertainable standard of "obscenity", the utmost care could not protect an accused from prosecution under it. He can never know when a particular trier of the fact will find a book to be "obscene" which the accused did not know was "obscene". What is unknowable cannot be done knowably or wilfully, and the statutory definition of an "obscene" book cannot be derived from the mental state of the person who writes or sells it. See the general discussion contained in the opinion of Justices Roberts, Frankfurter and Jackson in *Screws v. United States*, 325 U. S. at 152-7. The statute here does not measure up to the standards prescribed by this Court in numerous cases: *United States v. L. Cohen Grocery Co.*, 255 U. S. 81; *International Harvester Co. v. Kentucky*, 234 U. S. 216; *Connally v. General Constr. Co.*, 269 U. S. 385; *Champlin Refining Co. v. Comm'n*, 286 U. S. 210; *Lanzetta v. New Jersey*, 306 U. S. 451. See also, *United States v. Evans*, 333 U. S. 483; *United States v. Reese*, 92 U. S. 214, 221; *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518; *Manley v. Georgia*, 279 U. S. 1; *Tot v. United States*, 319 U. S. 463.

decent," as expanded by the construction of the court below. We have pointed out the limitless scope of the statute as a result thereof. This portion of the brief will be devoted to the crux of the questions presented—the issue of the validity of the standard enacted by the statute in relation to the essential freedoms which the First and Fourteenth Amendments are intended to protect from all governmental intrusion.

1. The Statute Vests Censorial Powers in the Machinery of Government.

The uncanalized standard fixed by the statute here vests in the State the arbitrary power to suppress and punish any speech, art or thought deemed "obscene" by government. This is the essence of censorship in the realm of the intellect. It has been constantly reaffirmed that the basic and most "pernicious" (*Thornhill v. Alabama*, 310 U. S. 88, 98) quality of censorship as to speech and thought is the investment in government of power to suppress or allow expression, not in accordance with any confining objective standard but by arbitrary choice alone. When a government official may "make his opinion the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own,"[26] it is "this" which constitutes "the essence of censorship" (*Near v. Minnesota*, 283 U. S. 697, 713). Censorship exists when—as in the case at bar—thought and expression are made subject to the invalidity of limitless discretion, when officials of government and juries are licensed to create their own standards in each case, when

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[26] *Virginia Statute of Religious Liberty*, authored by Jefferson, quoted and expressly approved in *Reynolds v. United States*, 98 U. S. 145, 162.

the mere existence of such standards results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within their purview. (*Niemotko v. Maryland*, 340 U. S. 268, 272; *Herndon v. Lowry*, 301 U. S. 242, 263; *Thornhill v. Alabama*, 310 U. S. 88, 98.)

Whatever the form of the sanction, this Court has uniformly stricken down proscriptions or prohibitions against expression cast in vague, unconfined, censorial terms, no different in principle and in substance to the characterization "inciting lascivious thoughts" or "arousing lustful desire." Thus, the following standards contained in state statutes have failed to meet the constitutional test: "[any] malicious, scandalous and defamatory" publication; "not of good character" or "not free from fraud"; "[of] such character as to be prejudicial to the best interests of the people"; "[not] of a moral, educational or amusing and harmless character"; "sacrilegious"; "immoral . . . or . . . . of such a character [as] would tend to corrupt morals"; "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting . . . crimes"; "obscene, indecent and immoral, and such as tend to debase and corrupt morals," even when confined by state construction to "obscene"; a cause not found to be "religious"; speech constituting a "conspiracy" "to commit acts injurious to public morals"; picketing "without a just cause or legal excuse"; "loitering" or "picketing" for objects characterized as "sweeping and inexact"; "proper or advisable"; parading without approval of city officer under standard of "the purpose of preventing riots, disturbances or disorderly assemblage"; licensing power under standard "for good reasons"; prohibition of advocacy amounting "nearly

to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others"; "opposition to organized government"; leaflet licensing statutes without any standard; sound truck permit statute without any standard; park address permit "custom" without any standard.[27]

The central evil inhering in an unconfined and unconstitutionally vague standard affecting speech and press is, therefore, the vice of total and arbitrary power of censorship inviting and authorizing those in authority to punish or permit speech and press in purely discretionary manner and as dictated by their will alone.

As applied to books, writings, art, literature or other communications, the censorial statute, punitive or preventive, both in operation and intimidating effect includes the expression of beliefs, ideas, opinions and sentiments which the Constitution protects from governmental abridg-

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[27] *Near v. Minnesota*, 283 U. S. 697, 701-2; *Schneider v. New Jersey*, 308 U. S. 147, 158; *Gelling v. Texas*, 343 U. S. 960; *Superior Films, Inc. v. Dept. of Education*, 346 U. S. 587; *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 497; *Comm. P. Corp. v. Regents*, 346 U. S. 587; *Winters v. New York*, 333 U. S. 507, 518-19; *Holmby Prod., Inc. v. Vaughn*, 350 U. S. 870, rev'g 177 Kan. 728, 282 P. 2d 412; *Cantwell v. Connecticut*, 310 U. S. 296, 301-2, 305; *Musser v. Utah*, 333 U. S. 95, 96; *Thornhill v. Alabama*, 310 U. S. 88, 91-2; *Carlson v. California*, 310 U. S. 106, 109-112; *Largent v. Texas*, 318 U. S. 418, 419; *Hague v. C.I.O.*, 307 U. S. 496, 502, 516-17; *Kunz v. New York*, 340 U. S. 290-1, 293; *Herndon v. Lowry*, 301 U. S. 242, 263-4; *Stromberg v. California*, 283 U. S. 359, 369; *Lovell v. City of Griffin*, 303 U. S. 444, 447-8; *Jones v. Opelika*, 319 U. S. 103, 104; *Saia v. New York*, 334 U. S. 558, 559-60; *Niemotko v. Maryland*, 340 U. S. 268, 269-72. Upon remand, the state court in *Musser* was unable to place a construction on the words "public morals" which would limit their meaning beyond their general meaning, and held the statute void for vagueness and uncertainty. (*State v. Musser*, 118 Utah 537, 223 P. 2d 193.)

ment. It is plain from a reading of the cases footnoted immediately above that had not this Court there intervened, the censor, whether by prior restraint or criminal punishment, would have suppressed protected expressions of ideas and opinions contained in newspapers, religious tracts, placards, motion pictures, books, peaceful assemblies and other related areas of communication. It would have suppressed ideas relative to politics, religion, government, entertainment, labor relations and a vast gamut of opinions without the consideration of which a self-governing society cannot endure. Nor should it be overlooked how broad in scope becomes the interdicted when once authority receives unfettered discretion to control the expression of the intellect. Consider, for example, the story of "The Miracle" (343 U. S. 507-508) and the attempt to suppress it under a standard of "sacrilegious"; the attempt to suppress "Native Son" as "presenting situations undesirable to the mutual interests of both races" (159 Ohio St. 315, 112 N. E. 2d 311, 313) and "La Ronde" from the writing of Arthur Schnitzler as pandering to "base human emotions" (305 N. Y. 336, 113 N. E. 2d 504), both attempts which were fortuitously frustrated (346 U. S. 487).

Statutes such as the one herein violate free speech and press because by their limitless area and scope they necessarily include within their terms utterly protected and free creative speech, art and communications. There is no basis or security in these laws for any lesser coverage or discrimination. There is in law and in overhanging threat a total inclusion of the entire realm of thought and expression of thought. Nor is this mere euphonism. History *proves*, it does not merely bear some witness to, the constitutional invalidity of these "mental obscenity"

statutes as a prohibitory standard over speech. History proves that within the compass and sweep of such undefined standards, speech, art and communication of the highest social significance and clearly embraced within the protective arms of the First Amendment have been abridged and suppressed. History proves, it may be added, that the book which incites "lascivious thoughts" or arouses "lustful desire" *must* be defended if all the books which civilization holds most dear—in science, religion, politics and the arts—are to be preserved.

2. The Historical Evidence of the Sweep of Such Standards as "Obscene" and "Lascivious."

Condemned as unreadably "obscene," "immoral" and "indecent" by some one or more of men and societies in history have been such men and works as: Keats' *Endymion;* Shelley's *Queen Mab;* Byron's *Don Juan* and *Cain;* Darwin's *Origin of the Species;* Freud's *General Introduction to Psychoanalysis;* De Maupassant's *L'Humble Verite, Une Vie, Woman's Wiles, The Wedding Night* and other stories; Voltaire's *Candide* and *The Philosophical Dictionary;* Pepy's *Diary;* Swift's *Gulliver's Travels* and *Tale of a Tub;* Hugo's *Les Miserables;* Whitman's *Leaves of Grass;* Swinburne's *Poems and Ballads;* Zola's *Nana, La Terre* and other novels; Ellis' *Studies in the Psychology of Sex;* Stope's *Married Love* and *Contraceptions;* Defoe's *Moll Flanders;* H. G. Wells' *The Work, Wealth and Happiness of Mankind;* Casanova's *Memoires;* Flaubert's *Madame Bovary;* Ibsen's *Ghosts* and *A Doll's House;* Shaw's *Mrs. Warren's Profession;* Balzac's all *Novels;* Anatole France's, all *Works;* Rousseau's *Julie;* Richardson's *Pamela;* Boccaccio's *The Decameron;* Ovid's *Elegies;* Remarque's

All Quiet on the Western Front; ALDOUS HUXLEY'S *Point and Counter Point* and *Antic Hay;* DREISER'S *An American Tragedy;* ARISTOPHANE'S *Lysistrata;* KANT'S *Critique of Pure Reason; The Bible;* CERVANTE'S *Don Quixote;* DUMAS', all *Novels;* and HAWTHORNE'S *The Scarlet Letter.*[28]

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[28]The sources in sequence are: St. John-Stevas, *Obscenity and the Law* (Lond., 1956), 46; *Moxon's Case* (1841), 2 Townsend, Mod. St. Tr. 356, St. John-Stevas, *supra,* 47-48, IV Cyc. Brit. "Suppression of Books", 246; *Lord Byron v. Dugdale,* 1 L. J. Ch. 239 and *Murray v. Benbow,* Jac. 474, n., St. John-Stevas, *supra,* 46; Gosse, *The History of the Censorship of Books* (1910); Blanshard, The Right to Read (1955), 138, Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 93; IV Cyc. Brit., *supra,* 246, Ernst and Seagle, *To the Pure . . .* (1928); App. III; IV Cyc. Brit., *supra,* 246, Craig, *The Banned Books of England* (1937), 185, 117, St. John-Stevas, *supra,* 262, App. IV, Burke, *What is the Index* (1952), 90, Gellhorn, *supra,* 88; Craig, *supra,* 184, 55; Haight, *Banned Books* (1955), xi, IV Cyc. Brit., *supra,* 246; Craig, *Above All Liberties* (Lond., 1942), 38; St. John-Stevas, *supra,* 262, Burke, *supra,* 90; IV Cyc. Brit., *supra,* 246; Craig, The Banned Books of England, *supra,* 184, 92, 194; IV Cyc. Brit., *supra,* 246; Craig, *supra,* 184, 44, St. John-Stevas, *supra,* 60, 263; IV Cyc. Brit., *supra,* 246, Craig, *supra,* 184, 46, 47, 49, St. John-Stevas, *supra,* 78, 263, Burke, *supra,* 90; Craig, *supra,* 184, 25, 61, 127-135, 169, Craig, *Above All Liberties, supra,* 44 *et seq., Sexual Inversion,* Comment, *Obscenity and the Law* (1954), Crim. L. R. 817, 834 n. 29; Craig, *The Banned Books of England, supra,* 185, 117-118; Craig, *supra,* 186, 100; Craig, *supra,* 186, 97; IV Cyc. Brit., *supra* 246, St. John-Stevas, *supra,* 262, 263, Craig, *supra,* 55; Burke, *supra,* 90, St. John-Stevas, *supra,* 57; St. John-Stevas, *supra,* 78; St. John-Stevas, *supra,* 78; St. John-Stevas, *supra,* 262, Burke, *supra,* 94; St. John-Stevas, *supra,* 262, Burke, *supra,* 90; St. John-Stevas 262, Burke, *supra,* 90; St. John-Stevas, *supra,* 262, Burke, *supra* 91, IV Cyc. Brit., *supra,* 246; Gellhorn *supra* 88, St. John-Stevas, *supra,* 263; Gellhorn, *supra,* 88, St. John-Stevas, *supra,* 263; IV Cyc. Brit., *supra,* 246, St. John-Stevas, *supra,* 263; St. John-Stevas, *supra,* 183, 263; St. John-Stevas, *supra,* 263; Gellhorn, *supra,* 94; Chafee, *Government and Mass Communications* (1947), vol. 1, 255; Chafee, *supra,* 255, Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 65; IV Cyc. Brit., *supra* 246; St. John-Stevas, *supra,* 262; Burke, *supra,* 97-98; IV Cyc. Brit., *supra,* 246, Gellhorn, *supra,* 56.

We have, of course, not exhausted the index *librorum prohibitorum*. The Irish censorship Board, under the standards of "indecency" and "obscenity," has banned an estimated 4,400 works. Four winners of the Nobel Prize for Literature appear on the List. The British Government *Report of the Royal Commission on Population* (1949) was placed on the list because it advocated birth control. In a debate in the Irish Senate, Senator Moore described the Board's list as "Every Man's Guide to the modern classics." (St. John-Stevas, *Obscenity and the Law* (Lond., 1956), 180, 183-184.) Solely between the years 1715-1750, France condemned, on moral bases among others, between 1,000 and 2,000 books, Voltaire being the most celebrated single victim. (Bachman, *Censorship in France from 1715 to 1750: Voltaire's Opposition* (N. Y., 1934).) Indeed, "mankind can hardly be too often reminded, that there was once a man named Socrates . . . the head and prototype of all subsequent teachers of virtue . . . [who] was put to death by his countrymen, after a judicial conviction, for impiety and immorality. Impiety, in denying the Gods recognized by the State; . . . Immorality, in being by his doctrines and instructions, a 'corrupter of youth.'" (Mill, *On Liberty* (Blackwell Ed., 1948), 21.) Tolstoty's *The Kreutzer Sonata* was banned by the Post Office Department in 1890, and Theodore Roosevelt denounced the author as a "sexual and moral pervert." (Haight, *Banned Books* (1955), 65.) In 1954, the Illinois State Library System directed that Hans Christian Andersen's *Wonder Stories* should be stamped "for adult readers only." (Gellhorn, *supra*, 56.)

Nor should it be overlooked that all of the foregoing acts of suppression and punishment were done at the time

with righteousness and certitude, with the heartiness of an indubitable conviction. Thus, a British critic wrote of Keats and *Endymion* that "not all the flimsy veil of words in which he [Keats] would involve immoral images can atone for the impurity [of *Endymion* nor for the fact that through it] he would palm upon the unsuspicious and the innocent, imaginations better adapted to the stews [houses of prostitution]." Quoted in St. John-Stevas, *Obscenity and the Law* (Lond., 1956), 46. Augustine Birrell wrote of Swift: "No fouler pen than Swift's has soiled our Literature. His language is horrible from first to last. He is full of odious images, of base and abominable allusions. It would be a labour of Hercules to cleanse his pages. . . . It is a question not of morality, but of decency, whether it is becoming to sit in the same room with the works of this divine [Dean Swift]." Quoted in Craig, *Above All Liberties* (Lond., 1942), 38. Blackwood's Magazine called Lord Byron, for his *Don Juan,* "a cool unconcerned fiend laughing with detestable glee over the whole of the better and worse elements of which human life is composed." (St. John-Stevas, *supra,* 47.) "The poem before us is one of those hole and corner deposits not only begun but spawned in filth and darkness." (*Id.,* 47.) The Saturday Review called Swinburne, for his *Poems and Ballads,* "the libidinous Laureate of a pack of satyrs." (St. John-Stevas, *supra,* 60.) Punch renamed the author, *Mr. Swineborne.* John Morley's Review read in part: "It is not merely the noble, the nude, the antic, which he strived to reproduce. . . . [There] is an enormous difference between an attempt to revivefy amongst us the grand old pagan conception of joy and an attempt to glorify all the bestial delights that the subtleties of Greek

depravity was able to contrive. . . . [No] language is too strong to condemn the mixed mildness and childishness of depicting the spurious passion of a putrescent imagination, of the unnamed lusts of sated wantons, as if they were the crown of character and their enjoyment the great glory of human life." (Quoted in St. John-Stevas, *supra,* 60-61.)

It is not essentially a matter of bad men, but of bad law and standard. The tragic and constant societal errors of suppression chronicled above confirm plainly that in history "obscenity," as a standard of prohibition over the written word, is inclusive—in gamut and reach, and necessarily so—of the finest literature, art and speech. So many errors, so serious in nature and quality, by so many men, in so many different eras, societies and circumstances, cannot otherwise be read.

Why did these events occur? The answer must be found essentially in the prohibitory standard governing speech and art. By the use of terms so broad and hateful as to defy definition and understanding—"obscene," "lascivious," "lustful"—by the use of these all encompassing terms, speech and thought patently free from governmental infringement were engulfed by an unfettered authority. That the standards would necessarily be inclusive of works of art and literature connected with matters of sex interest or stimulation is simply reflective of the logic of life itself.

There are sweeping areas of literature, art and thought which, if they are to avoid being moribund, unreal and bereft of creativity and honesty, must contain sex aspects of life, and hence some "tendency," great or less, to excite sexual, *i.e.,* "impure," thoughts. Literature and art and

thought will, therefore, continuously fuse with "obscenity," undefined. Without such fusion, literature and art cannot be free to deal with the actual in life, nor to advance the frontiers, in all fields of human endeavor and human relations. Critical art and thought in the tumbling arenas of political, religious, social, economic and cultural debate cannot be isolated from the line of sex stimuli marked by "obscenity." Science could not serve humanity if its literature did not, most directly, fuse the sex aspects encompassed by the standards, "obscene" and "lascivious." Art cannot avoid sex or its stimuli for it is bred of life itself. Under the unfettered standard of "obscenity," the beauty of Rodin's *The Kiss* or Titian's *Woman on a Couch,* or such writings as Chaucer's *Canterbury Tales* and Montaigne's *Venus and Adonis* would be lost. "Another troublesome example," stated Professor Chafee, "consists of the writings of Henry Miller, an American expatriate in Paris. If you admit that obscenity exists at all, then he is obscene. Yet some people say that he is our number-one novelist." (*Government and Mass Communications* (1947), Vol. I, 265.)

3. The Broad Standards of "Obscenity" and "Lasciviousness" Necessarily Include Ideas of Critical Value to Society.

It is of deep significance that in man's civilized literate life, the suppression of "obscenity" has recurrently provided civil authority with harsh and ready instrumentality for outlawing and exorcising critical, dissenting thought. In past societies expressions of new ideas or dissident beliefs affecting social, cultural or political institutions, or science, medicine or religion, have with revealing repetition been charged with intersecting the area of "obscenity," undefined, and their repression has been defended

as war waged against immorality and indecency. The "obscene," in terms of suppression, is often also the *critical*. "Concern about obscenity merges into a more generalized concern about supposedly dangerous thinking. . . . . In such instances books are censorially threatened because they are the repositories of ideas deemed injurious to society, or, to put it in the more common speech of the day, because they are subversive." (Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 67.)

Gulliver's Travels was held "obscene." Yet it is beyond challenge that this satire was a sharp and stinging political and social criticism. In social affairs, *Mrs. Warren's Profession* is kindred. In 1672, John Milton, who immortalized man's plea for liberty of expression, had two of his works, *Eiconoclastes* and *Defense of the People of England*, publicly condemned and burned as "impious" and "treasonable," needful to be burned "that our good subjects may not be corrupted in their judgments with such wicked" matter. (Vickers, *Martyrdoms of Literature* (1891), 378-381.) "'Silence aux pauvres!'—a prudent maxim, and the conception of obscenity one of the many aids to its enforcement." (Craig, *Above All Liberties* (Lond., 1942), 151.)

Books and writings clash also with "obscenity," undefined, when treating directly with critical sexual and physical questions such as marriage happiness and relations, procreation, venereal diseases, birth control, prostitution and the like. Whether cast as scientific discussion and analysis, instruction, information, or art expression, the interrelation with "obscenity" is immediate. (Dennett, *Who's Obscene* (1930, passim.; *United States v. Dennett*, 39 F. 2d 564 (C. A. 2, 1930).) Consider the profound

social import, yet the inevitability, of the charge of "obscenity" as to the scientific treatise *Origin of the Species* by Darwin, and the novel *The Well of Loneliness* by Radcliffe Hall, "a very restrained and reasonable plea for toleration of female homo-sexuality." (Craig, *The Banned Books of England* (1937), 36, 41.)[29]

In the religious area particularly is the fusion between criticism and obscenity evident and cautioning. In both the expression and repression of religious criticism in history the role of "obscenity" has been major in import. "Heresy" and "obscenity" have often been, and have even oftener been conceived, inseparable. Suppression of heresy has thereby been invested with moral support. Conversely, attacks upon established religions and religious institutions have frequently been cast as attacks upon obscenity, immorality and baneful practices asserted to be condoned by, or to be even engaged in or fostered by, the authorities of the established institution. On both sides "obscenity" has been a weapon against toleration of differing thought.

In the connection of religious criticism and "obscenity" it is notable that both the earliest (*Rex v. Curl*) and the most famed (*Regina v. Hicklin*) of the English decisions respecting suppression of "obscenity" were concerned

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[29] "John Addington Symonds' learned and discriminating treatment of Greek pederasty, 'A Problem in Greek Ethics', written in 1873 . . . has always [of necessity] been published privately. * * * The effort [in such a case] to suppress unpalatable historical facts in the supposed interests of morality defeats its own object because, never more than partially successful, it causes confusion of counsels. I have heard the undeniable existence of a homosexual element in Hellenic culture used as an argument in support of practices which incurred almost as much social obloquy in the age of Pericles as they do today." Craig, *The Banned Books of England* (1937), 167.

with conceivedly, indeed admittedly, "scandalous" and "obscene" religious-advocacy tracts. *Rex v. Curl*, 2 Strange 788 (1727), was a prosecution and punishment founded upon a publication expressing religious criticism and opinion, albeit extreme and perhaps crude in formulation. The book concerned was entitled *Venus Dans le Cloitre, ou la religieuse en Chemise,* or in English, *Venus in the Cloister or the Nun in her Smock.* This book was a translation and republication of a French religious tract by the Abbe Barrin, originally published in France in the century preceding, as a Protestant religious tract. The decision of the Court in *Curl* pointedly observed that "morality is the fundamental part of religion, and therefore whatever strikes against that, must, for the same reason, be an offense against the.con..non law." (Barnardiston's Rep. 295, A. D. 1744.) "The case illustrates two aspects of the moral censorship of literature which are worthy of note. One is the connection between that censorship and politics, . . . the other is the fact that 'obscenity' or 'pornography' are by no means clear-cut terms indicating something of indubitable moral worthlessness. . . . 'The Nun' started her career as a Protestant tract on the religious controversy of France. Thus we see, even at this early stage, that the web the law was weaving promised many a tangle and many a contradiction." (Craig, *Above All Liberties* (1942), 34-35.)

Again, the most celebrated of English "obscenity" cases, the source of the famous "Cockburn test," *Regina v. Hicklin*, L. R. 32 Q. D. 360 (1868), also involved publication of a tract aimed at Protestant criticism of Catholicism. The pamphlet was entitled *The Confessional Unmasked.* "The pamphlet consisted of extracts from Catholic theologians, one page giving the exact original Latin

quotations and the adjoining page furnishing a correct translation thereof. . . . It was not sold for gain . . . [but on behalf] of the 'Protestant Electoral Union,' formed 'to protest against those teachings and practices which are un-English, immoral, and blasphemous, to maintain the Protestantism of the Bible and the liberty of England.'" (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 55.) It may be interesting to note that the pamphlet was actually sold by one Henry Scott, a metal broker, who obtained from time to time supplies of the pamphlet and distributed them at cost (one shilling each). An order having been made under Lord Campbell's Act to seize and destroy the copies at hand, Steele appealed to Quarter Sessions "and the Recorder, a Benjamin Hicklin, found in his favor on the ground that although the pamphlet was obscene and its indiscriminate sale and circulation was calculated to prejudice good morals, his motive in selling it was the innocent one of promoting the objects of the Protestant Electoral Union and exposing the error of the Church of Rome, particularly as regard the confessional." (Craig, *Above All Liberties* (1942), 40.) It was this decision which the judgment of Lord Chief Justice Cockburn reversed.

It gives real pause to note that the expressions of vehement religious criticism condemned for "obscenity" in *Curl* and *Hicklin* would apparently be clearly protected today under *Cantwell v. Connecticut*, 310 U. S. 296. What of a rule of law repressing "obscene" publications founded upon, for America, unconstitutional cases?

There is no limit to the number and kinds of critical thought and observation which standards such as the ones herein necessarily include. The Bible has been suppressed, even burned, either *in toto* or in specific translations, to

prevent "corruptive" influence or to protect against "immorality."[30] Under Henry VIII and Mary Tudor many bookburnings occurred, including particularly the popularized translations of the Bible, New Testament, by William Tyndale. "It was ordered that all persons possessing copies of Tyndale's or Cloverdale's English version of the New Testament or any others in English by any of the men named above [Frith, Tyndale, Wyckcliffe, Joy, Roy, Basil, Bale, Barnes, Cloverdale, Turner or Tracy], should convey them . . . to certain designated officials, by whom the books were 'incontinently' [*i.e.*, forthwith] to be openly burned." (Gillett, *Burned Books* (1932), 21.) William Kilburne declared of the John Field translation that "many Libertines and licentious people did produce, and urge this Text from the authority of this corrupt Bible . . . in justification of their vicious" practices *supra*, 26. Not only the Bible, but all manner of tracts and treatises interpreting the Bible or commenting upon religious subjects were burned. The list of books takes up sixteen pages of print in *Gillett, supra*, Vol. II, 667-682. Queen Elizabeth on her accession to the throne was equally adamant in outlawing "lewd, heretical and seditious books" directed at the Established Church, *supra*, 52-54. Yet, all of these writings struck only "at some abuse of doctrine or practice" in the Established Church (*id.*, 77-78).

The example of heresy-suppression outstanding above all others is the burning and persecution of "witches." Literally thousands of unfortunates were tortured or

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[30]Farrer, *Books Condemned to Be Burnt* (1892), 28-29; Vickers, *Martyrdoms of Literature* (1891), 225-227; Adler, *Art and Prudence* (1937), 124-125; Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 78.

killed in its course. Yet no societal action was ever more avowedly rested on "obscenity" grounds that witch-extirpation. (Taylor, *Sex in History* (1954), Ch. VI, pp. 109-132.) The *Bull Summa Desiderantes* of Pope Innocent VIII against witchcraft inveighed against matters openly sexual and obscene, not theological, and asserted that witches had "abandoned themselves to . . . incubi and succubi" *id.*, 109. The official Church handbook on witchcraft, *The Malleus Malleficarum*, averred: "All witchcraft comes from carnal lust, which in woman is insatiable," and accused all witches of participating in wild sexual debaucheries in the Witches' Sabbath, and of practicing "homosexualism" and "the obscene kiss" *id.*, 115, 129, 131. "Accusations of witchcraft invariably ended with the charge that the accused had committed sodomy with the Devil 'despite his freezing coldness'" *id.*, 119. Indeed, in 1400 the civil law made "copulation with the devil" a capital civil crime *id.*, 126.

4. THE UNCONFINED STANDARDS OF "OBSCENITY" AND "LASCIVIOUSNESS" MAKE JUDICIAL DISCRIMINATION BETWEEN BOOKS A FRUITLESS AND INVALID ATTEMPT.

From all the foregoing, it appears plain, it is respectfully submitted, that "obscenity," undefined and unconfined, does include within the sweep of its terms broad areas of art, thought and speech unquestionably protected under liberty of intellect and expression, as secured by the First Amendment. The statute here has made no attempt even to narrow the standards, as has been attempted in other jurisdictions, with respect to the "antiquity" of the work, "literary quality," or "artistic, scientific, critical and/or educational" value or sincerity of

purpose of the author. This, in addition, to the total exclusion of resultant conduct as an ingredient of the offense. While these questions are therefore excluded as issues in the case, we nevertheless discuss some of these matters here as they impinge on the problem of censorship and free speech and press in the "obscenity" area.

The difficulty in delegating to judges and juries the power to make "exceptions" for particular books is that it simply opens the door, in the same unconfined and irrational way, for the exercise of arbitrary power to choose "friends" and punish "foes." The law lies then in the "exceptions," and they are not only undefined, but unexpressed. The same retrospective *ad hoc* judgments are again made with respect to expressions and thought which this Court has so uniformly condemned.

For example, it is difficult rationally to support an "exception" for the Bible or the classics of historical art. Clearly age cannot be a valid criterion or distinction, for no one can pretend that the last Michelangelo, Titian or Shakespeare has visited the earth for all time to come.

The notion that an exception can be made for books of "artistic worth and skill" also cannot bear scrutiny. Judge Frank has aptly stated that "no one can rationally justify the judge made exception. . . . Judges would have to serve as literary critics; jurisprudence would merge with aesthetics; authors and publishers would consult the legal digest for legal-artistic precedents; we would some day have a Legal Restatement of the Canon of Literary Tastes." (*United States v. Roth*, 237 F. 2d 797, 820 (C. A. 2, 1956).)

Sincerity of intent or purpose also appears to be a tenuous exception. As we indicated in our prior discus-

sion the undefined and unconfined standards of "obscene," "lewd," "lascivious," "indecent" and the like are not made knowledgable by requiring proof of "obscene," "lewd," "lascivious" or "indecent" intent. No test of intent or sincerity of purpose would have saved Keats, Byron, Swift or any of the others. Good purpose and intent are no security for any expression of thought or belief, even in religion. "The man who left on the memory of those who witnessed his life and conversation such an impression of his moral grandeur that eighteen subsequent centuries have done homage to him as the Almighty in person, was ignominiously put to dealth, as what? As a blasphemor. Men did not merely mistake their benefactor; they mistook him for the exact contrary of what he was, and treated him as that prodigy of impiety which they themselves are now held to be for their treatment of him." (Mill, *On Liberty, supra,* 22.)

Nor should it be overlooked that some of the greatest works of literature have intentionally, in form and expression, combined the "obscene" with the "pure." *Gulliver's Travels* is deeply critical, socially and politically; it was meant to be so. The book is permeated with "obscenity," undefined, and it also was patently meant to be so, and to shock as well. It would be difficult indeed to assess the quality of "dominant effect" in such work, either as to content or purpose, or in the writings or art of Zola, Chaucer, Titian or Rodin. Indeed, there are artists and creators who are unable to express the purpose of their creation. Ideas "may come, not as likenesses of anything, but as new births. They may be almost absolutely original. And as truly news in the world, in whatever degree, they will give pause to the routines of per-

ception and judgment; they will check the repetitive cycles of habit returning on itself, and compel heart and mind to stop, to look, to listen, and to take then, perhaps, new directions upon new ways of seeing, believing, and understanding." (Kallen, *The Ethical Aspects of Censorship* in 5 Social Meaning of Legal Concepts 34, 36 (1953).) To dwarf originality with "sincerity of intent and purpose" is to sterilize art and literature, a fate no better than the bonfire.

It is a belief easy to fall subject to uncritically that "obscenity" in whole and entirety is unrelated to true freedom of speech and press and played no role in the struggle for liberation of thought and the derivation of the First Amendment, and is entitled now to no share in the fruits of modern protective law. The contrary, as seen, is truly the case. So far from the struggle for liberation of press and speech being divorced from and unconnected to questions of "obscenity," the truth is, as seen above, "obscenity," as a sole, dominant or included governmental charge, played a *major* role in the suppression of thought during the years of struggle which birthed modern liberty and the First Amendment. "Obscenity" was part and parcel of the repressions of religious, political and cultural criticisms which called forth our modern law. It is not often noted now, but it is deeply educating to observe that Milton's *Areopagitica*, the landmark plea in all English history for liberty of thought and expression and the lineal forbear of our First Amendment, was called forth by suppressive censorship of a book by Milton entitled *The Doctrine of Divorce*, a writing not political nor even theological but *moral* in subject and treatment, and one immediately assailed on publication under bitterest

charges of "immorality."[31] Moreover, in contents *Areopagitica* made direct plea for freedom of books in the avowedly *moral* and "obscenity" fields, as well as other areas, to the end of enabling men to rise beyond a "cloistered virtue" only, and stultification.

Moreover, *Areopagitica* was directed against the Licensing Act of 1643, instigated by Archbishop Laud, the avowed purpose of which was greater censorial control over just such schismatical religious writings as had that very year brought the pillory, ear cutting and imprisonment to men now famed in the annals of liberty of press and speech, including Prynne, Bastwick and Free-born John Lilburn, associated in authoring and publishing anti-Episcopacy religious tractates charging gross immoralities against the established church. Bastwick's *Letany* "appeal[ed] for the truth of his charges of immorality against the clergy . . . to the actual cases that came before the High Commission." (Farrer, *Books Condemned to be Burnt* (1892), Ch. III, 86-87.) "The people strewed the way from the prison to the pillory" with flowers and sweet herbs at the pillorying, and ultimately the victims were vindicated and freed, and after *Areopagitica's* publication Laud was brought to trial and executed. (*Id.*, 83.) Liberty established itself. Let us therefore not speak of liberty of press and speech without remembering these and like pilloryings and imprisonments, and recalling the closeness, even the identity in important measure and instances, of "obscenity" to criticism and forward-looking thought.

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[31] *Areopagitica: A Speech to the Parliament of England, with Prefatory Remarks and Notes*, edited by T. Holt White, Esq., London 1819, xlviii, 15-Encyc. Brit. 507, 509.

In conclusion, we submit that the statute here, as construed, enacts a totally all-inclusive and fatally vague prohibitory standard over speech and thought, utterly ambiguous and therefore totally censorial. "This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition . . ., the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxy." (*J. Burstyn, Inc. v. Wilson*, 343 U. S. 495, 504.)

5. "Hard Core" Obscenity, Undefined, and Freedom of the Press.

Finally, in this portion of the brief, we would refer to the attempt to mark out an area of "hard core" obscenity, or "dirt for dirt's sake." The deeply held premise by some persons that there are writings which are anathema to *all* men—so hateful that *no* person would seriously defend them and so lacking in social value as to be wisely suppressed—is an issue which only tangentially arises here. We have urged, however, at the outset of our discussion that even if the statutory standard could be confined to literature containing "hard core" obscenity, which it cannot as we have shown, the constitutional issues would still intrude. The problem of what is meant by "hard core" obscenity would still remain; the suppression of books, merely because of their contents, unrelated to conduct, would still continue. Liberty of choice in the realm of the intellect would still be throttled.

It may appear acceptable to separate "good" books from "bad" books solely by their scatological or profane

contents, or by their depiction of parts of the body or acts of a private or intimate nature, which in turn may be either merely offensive, or illegal if committed, but the premises upon which such an acceptance is made are not supportable. "Public taste and standards change. The 'dirt' of today may be the art of tomorrow. One day some comic-strip artist of our time, time may be respectfully regarded as another Hogarth or Edgar Allan Poe." (St. Johns-Stevas, *Obscenity and the Law* (1956), Introduction, XI.)

That "mental obscenity" however constituted is reprehensible and evil is itself but a point of view—an opinion—and, indeed, a very contested one, and the speech, depictions and contemplations disapprobated under such thesis are merely expressions and manifestations of the contrary thought and view. It is hard to see, the while such matters are confined solely to depiction and contemplation without conduct or coercive encitement, why there alone in all the area of idea differences intervention of law rather than private exercise of thought, choice, and free exchange should rightfully provide resolution. Every communication or depiction, however "obscene" in content, communicates at the least a portion of knowledge and nature and exemplifies, if nothing more, a belief rebellious against prevailing morality, modesty and prudery, and generally supportive also of the thesis of catharticism or of need for increased social toleration and understanding of sexual extremes, abnormalities or excesses. Such ideas may prove right. It is short years since Freud's ideas were not even discussable, yet now his theses are at least cognizable everywhere. If the Kinsey Reports chronicle their interviews accurately the statistics resulting from

those studies should have surprised almost none among us, privately; publicly they created headline surprise to all but the rarest few, at least professedly. There may be a question whether our minds, which cannot be "willed" into compliant renouncing of thoughts deemed "obscene," however commanded, may not be advancing considerably more rapidly than our mores.

Truly, in democratic terms, matter which is solely contemplative and depictive cannot be anything but a virtue since, whatever its character, it is in whole merely a part of the raw material of stimuli and thought from the body of which free minds through the marketplace of exchange and opinion construct and evolve the values of society. Since such free marketplace process alone can by premise be safely entrusted to judge good from evil, it cannot but be desired that the raw origins in the process be preserved free from any prior selections. To destroy the very expression of thought in the area of "obscenity" to prevent feared acts or wrongs, destroys truly not the crime but the *man* and the very process of liberty itself in a free society.

Virtually no "obscene" literature, art or other communication is "advocative" of anything; it is rather depictive, descriptive and communicative only. No one disputes the state's power to regulate conduct which objectively and directly injures persons, whether such conduct, or incitement to conduct, be denominated "obscene" or otherwise. What is attempted here is not the regulation of conduct, but the regulation of expression or contemplation or perusal. This is done on the assumption that the very *thought* is an evil, condemned by *all*, suppressible *in se*. The mere depiction or the communication of the idea is

enough, it is argued, to warrant criminal punishment. The long struggle of mankind has eliminated such concepts in the areas of treason, sedition, blasphemy and heresy. Only in the area of "mental obscenity" are such views suggested.

The fact is that even as to conduct, societies have so varied as to what is "obscene" as to make it self-defeating to suggest that mere ideas and contemplation of matters now disapprobated, however intensely, are unreadably evil and wrong. (See App. C, pp. 18-21.) "The Mohammedans veil the faces and are not disturbed by uncovered bodies; we leave the faces bare, but would find an 'evening gown' which lays a woman nearly bare to the waist, shameful in the morning but not after sunset. Puritans will bundle, but not flirt; their Victorian descendants will flirt but not bundle. And so on, in endless variety." (Kallen, *Indecency and the Seven Arts* (1930), 37.) What will arouse condemnation as "obscenity" and "indecency," with respect to conduct or practises of the most open and intimate sexual nature, varies with race, time, place and circumstances. (Scott, *Into Whose Hands* (1945), 17-18; Chafee, *Government and Mass Communications* (1947), 263-264; Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 83, 259-261, 269, 274.) And if there is no definable area in conduct, even less is there any definite area in the mere expression of "obscenity" in art, thought and literature, without engagement in conduct. The number of men and societies who have practiced or tolerated such expression is long indeed. At every stage of its development European civilization has known both "pornography" and "obscenity." Robustness and lack of inhibition characterized Anglo-Saxon and medieval literature. Bawdiness was not

considered incompatible even with religious devotion. (Craig. *Above All Liberties* (1942), 172, 185; St. John-Stevas, *supra,* 2-5.)

The truth is, in sex areas, anthropology and history demonstrate most persuasively that the content of social restraints is a matter of arbitrary, cultural mores, not of absolute and eternal "rightness," varying over the globe and throughout history after the manner of a game of spatial and temporal roulette. As to mere thought and contemplation in such areas, it would seem compellingly evident, as a matter both of liberty generally and of liberty of thought and speech specifically, that total freedom should be *particularly* required in sex areas—by liberty of speech, so that society can judge and rejudge most wisely there as to matters of conduct rightfully amenable and healthy influencing and control; and by liberty generally, so that by independence and free knowledge, contemplation and choice individual man can attain, or aspire to, true nobility and virtue.

Before we can be "certain" as to what is or what is not "hard core" obscenity, we should constantly recall, it is submitted, the nexus between books so designated and the rich minds and ideas with which they are related in past and contemporary history. A great mind like Swift wrote an "obscene" book, foreshadowing concepts which were to be later expressed in the scientific formulations of Freud and Ellis. A mind so deep and keen as Mr. Justice Holmes did not shy from "naughty French novels." Franklin authored "The Speech of Polly Baker," and also signed the Declaration of Independence. Rousseau wrote the "obscene" *Julie* and the *Social Contract*. Zola wrote *J'Accuse* and *Nana*. The close play of "pure" and "im-

pure" ideas and men cautions against suppression of "obscenity" in any idea or man.

As to reading, each reader holds the power to stop at will, and cannot be a "captive audience." None should be precluded from writing or reading as his own rather than another's taste may determine. (Gellhorn, *supra*, 101-102.) Here it is possible to allow perfect liberty of expression without involving any inevitable interference with the freedom of others. Especially is this true in matters relating to sex. If the function of democracy is to produce wise answers and solutions, then clearly it is important to permit the unfettered interplay of sex ideas. Sexual morality is a field upon which there are less final conclusions than any other. There is no common agreement on ultimate moral attitudes. This is as true of divorce, as it is of birth control or homosexuality, or "matrimonial happiness" in general. (St. John-Stevas, *supra*, 196.) Far from being unimportant, restrictions on "obscenity" in sex matters affect crucially the physical and moral health of individuals. (Scott, *Into Whose Hands* (1945), 3.)

Over his own thoughts and mind "the individual is sovereign." One is not free either to reject or commit a "vice" or "obscenity," unless he is free to know, understand and see depicted these subjects, with all their full aspects and counterpoles. "Innocence may be founded on ignorance, but virtue is evermore based upon knowledge." (Francis E. Willard, quoted in Schroeder, *Free Press Anthology* (1909), 196.) "Obscenity" lies in the conditions which render ugliness and perversity possible and not in the exposure of such ugliness or perversity. If democracy and free choice cannot be trusted in the moral area, its value is suspect in every area of human relations.

"Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of Kings to govern him? Let history answer this question." (Jefferson, *First Inaugural Address*, quoted in Jones *Primer of Intellectual Freedom* (1949), 143.)

The products of the printing-presses should be left to the judgment of the people. Choice is the indispensable foundation of democracy, and true morality in democracy's terms. That is the essential liberty, including as it must the freedom to choose wrongly as well as rightly. "I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather; that which purifies us is trial, and trial is by what is contrary. That virtue therefore which is but a youngling in the contemplation of evil, and knows not the utmost that vice promises to her followers, and rejects it, is but a blank virtue, not a pure; her whiteness is but an excremental whiteness. . . . Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read." (John Milton, *Aeropagitica* (in Great Books of the Western World, pub. by Encyc. Brit., Vol. 32, pp. 390-391).)

In democratic terms there cannot be virtue without choice, nor choice without knowledge and right of contemplation. Banning "mental obscenity"—mere depictive communication and contemplation without conduct—bans not vice but virtue, or the opportunity and necessary preconditions of such, and destroys the individuality and responsibility upon which either baseness or virtue can be selected by man at all. Independence is the first precondition for worth or unworth at all in men, and destruction of the freedom essential to such destroys not evil and vice, but the *man*.

D. Freedom of Speech and Press and the Suppression of "Obscene" Books—Societal Values in Balance.

The "crucial evil" upon which the State has seized here is essentially the writing and reading of books. Literature has been compressed into the criminal law as if the problem were no different from the crime of rape or the exposure of "one's private parts in public." The specific thrust of the statute is at books which stimulate "lascivious thoughts" or "lustful desire." Yet, as to this specific evil, a developing body of scientific thought indicates that books have only a minimal connection with arousal of erotic desire, compared to a host of multifarious stimuli which the State does not purport to suppress. It is argued that back of the law is a belief that some books may cause sexual misconduct, but even less proof exists for this thesis and most clinical evidence points in an opposite direction. Moreover, what sexual misconduct is stimulated by the reading of books which a State has a right to prevent is also obscure.

As against this essentially insubstantial and ephemeral "evil," there should be weighed the consequences which flow from a statute against speech embodying the vague

and limitless standards which the one herein contains. In "balancing the scales," we submit that the demands of the Constitution are not met. The disastrous effects of the all-encompassing and wholly arbitrary statute here upon societal values of the utmost significance should not be overlooked.[32] These values, although encompassed *in toto* in freedom of speech and press, include freedom from censorship generally; freedom, especially, for art and literature to express themselves unrestrictedly; and freedom for each man in society to be free as an individual to reach social judgments on all matters including standards of morality. The narrowest of statutes in this field could work injury but the consequences of the sweeping statute at bar are disastrous.

1. The censorship of morals, of sexual purity in the minds of citizens, is at one and the same time evidence of a desire to maintain the *status quo* in sex attitudes and to suppress controversy on matters of sex and sex relations. It is a recognition in itself that in these matters there are at present different views, tastes and judgments. The attempt here is to impose the notion of authorities upon persons persuaded of a contrary view, and thus to obtain unanimity of opinion. Accustomed as we are to accept differences in areas of politics, religion and almost every other sphere of life, it is anomalous that only in the area of sex mores should repression rather than expression be the rule of law.

Under this "mental obscenity" statute, no witness ever appears to prove that he himself has been corrupted by the book in evidence. The cry for censorship in this area

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[32]In Appendix D, pp. 32-44 we have set forth some of these societal values as expounded in the writings of Milton, Macauley, Mill, Madison and Jefferson.

very seldom comes from persons who wish their own morals protected; it is the morals *of others* they are constantly seeking to control. In other words, there is developed here an authoritative group, who knows "exactly" what is the "truth" about sex morality and attitudes.

The social consequences of all of the above cannot help being unwholesome for a self-governing democratic society. Immediately, it leads to evasion, making citizens furtive evaders of a law which would censor the uncensorable. "Every censorship produces a technique of evasion as well as a technique of administration." (Harold Lasswell in III *Cyc. of Soc. Sci.*, 294.) The tendency is for sex morality to flourish "underground," venting itself on occasion into "sex revolutions." Indeed, what the censor suppresses, becomes all the more desirable because of its repression. The debt which the best seller lists owes to the censor is immeasurable. All of this, it is submitted, the freedoms guaranteed by the First Amendment were intended to prevent.

Moreover, "knowledge of censorship introduces a debasing distortion in the way an object is thereafter perceived. A book, magazine, film, painting or letter which is known to have been banned, as a whole or in part, is approached with curiosity focused upon its wickedness. . . . One of the unfortunate consquences of the New York State ban on the movie 'The Miracle' (now happily removed by Supreme Court action) was that its impact as simple drama became obscured by debate over possibly offensive interpretations." (Goodwin B. Watson, *Some Effects of Censorship upon Society*, 5 Social Meaning of Legal Concepts 73, 77 (1953), published by New York University School of Law.) Censorship, therefore, exorcises ideas of profound importance out of books by the

very stamp of "lewd" and "lascivious." In this constant search for the "obscene," the censor corrupts men and ideas, debases them and stultifies them so that persons are all the more ready for conformity and irrationality. This is not the road a democratic society can afford to travel in the atomic age.

Censorship of books for "sexual impurity" affects the health and welfare of the whole of society. The evidence is overwhelming that the dogma of the sex censor has led to sex ignorance and mental aberrations which have been responsible for increases in insanity, neuroses, venereal diseases, unhappy marriages, divorce and separation. "These miscalled 'purity' associations primarily destroy the opportunity of all for gratifying a healthy and natural curiosity and thus of necessity they aid in developing morbidity in relation to sex." (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 122.)

By the vagueness and incomprehensibility of its standards, the censor succeeds in creating fear and self-censorship in the writing and reading of all books. Everything tends to become "taboo," except as the censor ordains otherwise. "Opinions thought to be potentially subversive of governing authority and those thought to be subversive of the established social and moral order evoke an essentially similar reaction: They are too dangerous to be allowed to circulate! Thus the censorship of 'obscenity' and the censorship of 'sedition' or 'propaganda' are seen to have a common core." (Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 67.)

The nub of it all is that throughout history suppression undertaken in the name of "obscenity" has ended with crippling restrictions on liberty of thought critical in each era to man's growing emancipation and enlightenment.

Religious, social, political and scientific fundamental changes have all in their time been held "obscene." The more that thought in any era has probed the fundamentals of accepted society, on whatever score the more surely has such thought been condemned as "fearful," "scandalous," "immoral" and "obscene." And always the repression has been with *righteousness*. The Maid of Orleans and Tyndale's Bible[33] were burned with fervor. In history, righteousness has ever been but one century removed from proven error and misapprehension.

The expression of sexual freedom and exploration in such thought is today often treated as "witchery." Yet, if we hold faith in the democratic premise, we cannot fear the circumstance that many men in the private, "ballot box" immunity of individual reading, may select and choose literature constituted by professed societal standards as "obscene." One cannot well accept a principle that truth is best reached in common by private uncoerced thought and judgment, and then dispute the results when such are unpleasing. The wide reading of so-called obscene books should be viewed as the cautioning and healthy sign of democracy that private judgment is in measurable degree diverging from the professed social standards of an alleged majority. The indication is that perhaps here, again, mankind is, or may be, emergently awakening from "the deep slumber of a decided opinion." (Mill, *On Liberty* (1946), 38.)

2. In restricting the expression of ideas in art and literature, as markedly as these "obscenity" statutes have done in history, the Censor succeeds in virtually emasculating the entire cultural, spiritual and intellectual life of

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[33]Now the English received translation." (Farrer, *Books Condemned to be Burnt*, *supra*, 28.)

a people. Art and literature do mirror life and they do portray life "in the raw." The Censor would destroy these portrayals on the assumed peril of "corruption of the spirit."

Art and literature do more—they stimulate the imagination, they suggest a "life beyond life" in fictional characters, sometimes beyond conception. To the Censor, this seems to discredit the *status quo*, the morally conventional pattern. Unless art and literature are devoted to authority, they become suspect. "But in general the literary artist has tended to be a revolutionary rather than a conservative. To picture or even to mention 'the light that never was, on sea or land' is to turn the imagination from what is to what may be or at least once to conceive would be to desire." (Irwin Edman, II *Cyc. of Soc. Sci.*, 225.)

As against these "dangers" which bring the deadening hand of the censor into play, should be considered the important individual and social functions of art and literature. Art and literature are conditioned by the social circumstances in which the artist works. Their themes are a reflection of society at any given time in all its manifold manifestations. They reflect the different and shifting standards of taste, politics, morals and other social values. They express the endless variety of opinions on everything from dress to philosophy or religion. They afford opportunities for play, for relaxation, for satisfaction, and above all, opportunities for the search for truth in every area of human experience. The "pursuit of happiness" is impossible without them.

3. Finally, suppression of writings because of their "obscene" contents does violence to the fundamental principles upon which the security of the Nation depends.

It does violence to the fundamental democratic philosophy embodied in the writings of Milton, Mill and Jefferson and which have been the warp and woof of American society. Freedom of speech and press are not merely the means of permitting minority opinion to express itself; freedom of speech and the press is of intrinsic value to the whole of society as the best means of attaining progress in civilized life. The history of Western civilization is in large measure a history of the struggle for unfettered liberty of thought.

Free speech and press base themselves upon the conclusion, fortified by experience, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." No official of government is deemed wise enough to be trusted to discriminate between valid and invalid ideas. These freedoms recognize that suppression of itself either tends to impart a seeming validity to the idea or that the idea, if valid, will survive such persecution. "On the other hand, if opposition by speech is allowed, it will be impotent if the speech is mere fulmination; if the thought is valid it will effect the inevitable change in existing institutions by the nondisruptive process of conversion." (J. M. Landis, VI, *Cyc. of Soc. Sci.*, 458.)

At the root of all suppression of freedom of speech and the press is a fear of unorthodoxy, whether in religion, politics or morals—a fear which has no excuse nor place in our strong democracy. The continuance of that strength depends upon the freedom to think, to question, to speak, to write—and for the other person to listen and to read. Only in this way can a society grow from ignorance and irrationality to knowledge and reason, the firmest pillars of public morality.

II.

The Statute, Penal Code, Section 311, as Applied Here to the Mailing of Circulars and the Keeping of Books for Sale by Mail Is Repugnant to Article I, Section 8, Clause 7 of the United States Constitution and Unlawfully Infringes on a Sphere of Activity Reserved Exclusively to the Federal Government, Respecting Which the Federal Government Has Fully Legislated, Preempting the Field.

Appellant operated a mail order business [R. 101]. He mailed [R. 47-48, 107-109] advertising brochures which show on their face a mail order operation [Ex. 2, R. 26; Ex. 3, R. 27; Ex. 8, R. 32]. He then filled by mail the orders received by mail [R. 101, 108, 110]. Respondent built its case around appellant's mailing activities, introducing as Exhibit 7 [R. 29] "three small packets of gum backed labels which appear to be for the purpose of placing on a mailed envelope. One is labeled 'S Shop, Box 24646, West Hollywood 46, California.' Another is labeled 'From Sailor Jock's Club, 8923 Sunset Strip, Los Angeles 46, California.' The third is labeled 'This parcel may be opened if necessary Mail Merchandise Mart, Hollywood 46, California, contents merchandise books.'"

Respondent's witnesses spoke of seeing "mailbags" in the warehouse [R. 31] and the office [R. 35], and of seeing six women "busy typing addresses from an address list onto envelopes which contained these brochures" [R. 35], and of seeing [R. 36] and taking [R. 33] "mailing lists." Mrs. Regas, former employee of appellant [R. 46-47] testified that advertising brochures were mailed from the office [R. 47] and that she affixed gummed labels to envelopes containing one or more of appellant's business names [R. 48].

The inescapable conclusion flowing from Mrs. Regas' testimony [R. 46-50] and the entire record is that appellant was engaged solely in a mail order business and that he was convicted for his mailing activities [R. 80-81]. It should be observed that California does not seek to criminalize the possession alone of obscene books but only possession and keeping *for sale*. Here, as we have seen, the only proof of a possession for sale consists of the proof of keeping for mailing.

A. The Keeping of "Obscene" Books for Mailing and the Mailing of an Advertisement of Such "Obscene" Books Is Subject to Federal Jurisdiction.

Congress has made it a crime to mail or advertise by mail an obscene book (18 U. S. Code, Sec. 1461). It is also a federal offense to import or to place with a common carrier for interstate or foreign commerce an obscene book (18 U. S. Code, Sec. 1462). In 1955 Congress made it a crime to transport in interstate or foreign commerce an obscene book (18 U. S. Code, Sec. 1465). Congress has also enacted legislation denying mailing privileges to anybody advertising by mail or mailing an obscene book (39 U. S. Code, Sec. 259a). In aggravated cases the Postmaster General may deny mailing privileges without notice or hearing to a person who advertises by mail or mails an obscene book (39 U. S. Code, Sec. 259b).[34] These Acts have been given broad reach. (*United States v. Alpers*, 338 U. S. 680; *Hornick v. United States*, 229 F. 2d 120 (C. A. 3, 1955). Congress has not, however,

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[34]This legislation followed the opinion of Mr. Justice Douglas in *Stanard v. Olesen*, 74 S. Ct. 768 which stated that absent specific congressional authorization the Postmaster General had no power to impound mail without notice and hearing.

made it a crime nor has it sought to reach in so many words the keeping for mailing of "obscene" books. It is clear, however, that *if*, as we assume for the purpose of this argument, Congress may forbid the actual mailing of obscene books, it plainly could, if it wished, regulate the *keeping* of said books for mailing, as well as the ultimate mailing. It has been held, for example, that interstate commerce is not confined to transportation from one state to another but "comprehends all commercial intercourse between different states and *all the component parts of that intercourse.*" (Emphasis supplied.) (*Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.) In *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1, 9, the court said of the postal powers:

> "The powers . . . granted . . . were entrusted to the general government for the good of the nation. [Therefore] it is not only the right but the duty of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."

In *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, the Court held that the constitutional power of the United States over its waters was not limited to control for navigation. The authority, the Court held, "is as broad as the needs of commerce." *Supra*, at 426. In the Shreveport case, *Houston & Texas Ry. Co. v. United States*, 234 U. S. 342, the Court held that the Interstate Commerce Commission could set local rates for clearly intrastate transportation, saying that Congress possesses "the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate

carriers may thereby be controlled." *Supra,* at 353. In *Swift & Co. v. United States,* 196 U. S. 375, the defendants contended that certain of the acts in restraint of trade were not acts of interstate commerce and so did not fall within a valid reading of the Sherman Act. The Court however, sustained the Government on the ground that the "scheme as a whole" came within the Act and that the local activities alleged were simply part and parcel of this general scheme. In *United States v. Wrightwood Dairy Co.,* 315 U. S. 110, the Court sustained an order of the Secretary of Agriculture fixing the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground of its applying to milk produced and sold intrastate. The Court sustained the regulation, pointing out that since Congress had the power to regulate the price of milk distributed through interstate commerce "it possesses every power needed to make that regulation effective" including the right to regulate milk produced and sold intrastate. The power, it observed:

> "extends to those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end."

Noting that the "power of Congress over interstate commerce is plenary and complete in itself" the Court concluded that

> "no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." (*Supra,* at 118-119.)

Because the postal powers have been given by the Constitution to the national government, and because the national government owns and operates the postal powers as well as regulates it, the national control over the mails is even broader than its control over interstate commerce which it merely regulates. In *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1, the Court struck down a state statute which granted to one company an exclusive right to operate a telegraph business in the state. The law was found to be incompatible with a federal act which granted to any telegraph company the right to construct its lines upon postal roads. The Court held that the national control over commerce and the post roads prohibited a state from granting the monopoly there in question. In *Johnson v. Maryland*, 254 U. S. 51, it was held that a state could not punish a person for operating a mail truck without procuring a license from the state authorities. In *Illinois C. R. Co. v. Illinois ex rel Butler*, 163 U. S. 142, an Illinois statute which as construed by the state courts required an interstate mail train to make a detour of seven miles in order to stop at a designated station was held unconstitutional as being in conflict with the postal powers granted to Congress.[35]

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[35]The Court has approved some state regulations which, unlike the case at bar, have a trivial or remote relation to the operation of the postal service. *Gladson v. Minnesota*, 166 U. S. 427 (intrastate train had to stop at county seat when it could do so without deviating from its course.) *Price v. Pennsylvania Ry. Co.*, 113 U. S. 218; *Martin v. Pittsburgh & L.E.R. Co.*, 203 U. S. 284 (local laws classifying postal workers with railroad workers for the purpose of determining a railroad's liability for personal injuries); *Railway Mail Assn. v. Corsi*, 326 U. S. 88 (subjecting a union of railway mail clerks to a general law forbidding any labor organization to deny any person membership because of his race, color or creed); *United States v. Kirby*, 7 Wall. 482 (arrest of postal employee charged with murder while engaged in carrying out his official duties.)

In *In re Debs,* 158 U. S. 564, the Court gave perhaps its broadest interpretation of the scope of the postal powers. Speaking of the national power over interstate commerce and transportation of the mails, Justice Brewer for the Court said:

> "While under the dual system which prevails with us the powers of government are distributed between the state and the nation and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and in the exercise of those enumerated powers, acts directly upon the citizen and not through the intermediate agency of the state." (*Supra,* at 578.)

Pointing out that Congress has by a mass of legislation established the "great post office system of the country, with all its detail and organization, its machinery for the transaction of business, defining what shall be carried and what not," the Court noted:

> "Obviously these powers given to the national government . . . . were not dormant and unused. Congress has taken hold of these matters and by various and specific acts has assumed and exercised the powers given to it and was in the full discharge of its duty to regulate . . . . the mails. The validity of such exercise, and the exclusiveness of its control, has been again and again presented to this court for consideration." (*Supra,* at 580-581.)

The Court, citing *Searight v. Stokes,* 3 How. 150, observed that the United States has a property interest in the mails, saying:

> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of

all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails." (*Supra*, at 582.)

In all we have said so far we have assumed the constitutionality of the congressional acts prohibiting the mailing of "obscene" matter. We have done so because we do not understand the respondent to question the constitutionality of the federal statutes, but rather, respondent takes the position that the federal acts do not cover the field exclusively, but on the contrary leave the states with control over "keeping for sale by mail" of obscene matter. The determination of whether Congress has sought to occupy exclusively a given field of operation—mailing (including keeping for mailing) of "obscene" books—is dependent upon an analysis of the statutes in question and circumstances upon which it was intended to operate. (*Pennsylvania v. Nelson*, 350 U. S. 497; *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148.)

B. "Keeping for Sale by Mail" of "Obscene" Books Is Subject to Exclusive Federal Jurisdiction; the State Has No Power in This Area.

We deal here only with the conviction under Count I (keeping obscene books for sale by mail) since it presents a more controversial question than Count II (mailing advertisements of obscene books). The federal acts deal precisely with the latter situation and preemption is therefore more obvious. Indeed, if the state as well as the federal government could punish for mailing an advertisement of an "obscene" book, appellant would be subject to double

punishment for the same overt acts, which raises additional constitutional questions. (*Pennsylvania v. Nelson,* 350 U. S. 497, 509; *Cf. Houston v. Moore,* 5 Wheat. 1, 31, 75; *Jerome v. United States,* 318 U. S. 101, 105.)

(1) THE SCHEME OF FEDERAL REGULATION IS SO PERVASIVE AS TO MAKE REASONABLE THE INFERENCE THAT CONGRESS LEFT NO ROOM FOR THE STATES TO SUPPLEMENT IT.

Congressional power over the mails is practically plenary. (U. S. Constitution, Art. I, Sec. 8, Clause 7; *Donaldson v. Read Magazine,* 333 U. S. 178; *Milwaukee Publishing Co. v. Burleson,* 255 U. S. 407; *Lewis v. Morgan,* 229 U. S. 288; *Public Clearing House v. Coyne,* 194 U. S. 497; *In re Debs,* 158 U. S. 564; *Ex Parte Jackson,* 96 U. S. 727.) And as we observed Congress has fully legislated in the field (18 U. S. Code, Secs. 1461, 1462, 1465; 39 U. S. Code, Sec. 259, subds. (a), (b) and (c).)

The conclusion is inescapable that Congress has intended to occupy the field of obscenity in the mails.

> "Taken as a whole, they evince a Congressional plan which makes it reasonable to determine that no room has been left for the state to supplement the federal law." (*Pennsylvania v. Nelson, supra,* at 504.)

Therefore, a state obscenity law touching the mailing of obscene matter "is superseded regardless of whether it purports to supplement the federal law." (*Pennsylvania v. Nelson, supra,* at 504.)

> "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition and a state law is not to be declared a help

because it attempts to go farther than Congress has seen fit to go." (*Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604.)

"For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for the purposes or by methods which the federal act prohibits." (*Garner v. Teamsters Union*, 346 U. S. 485, 500.)

In *Dumont Laboratories v. Carroll*, 184 F. 2d 153 (C. A. 3, 1950), cert. denied, 340 U. S. 929, the Court held that Pennsylvania could not apply its censorship law to television programs originating in Pennsylvania since control of radio and television was exclusively within federal jurisdiction.

(2) The Federal Statutes Touch a Field in Which the Federal Interest Is so Dominant That the Federal System Must Be Assumed to Preclude Enforcement of State Laws on the Same Subject.

The power of Congress over the mails is broader and more complete than its power over interstate commerce. This is so because the government is the creator, owner and operator of the postal system, whereas it merely regulates interstate commerce. In this area federal power is practically plenary. (*Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407; *In re Debs*, 158 U. S. 564; *Hines v. Davidowitz*, 312 U. S. 52.) Moreover, we are here dealing with a First Amendment question and all such questions are peculiarly within this Court's ultimate protective powers. (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 640.) Freedom of press, of

course, comprehends every sort of publication which affords a vehicle of information and opinion. Such liberty is protected at every step in the process of creation, publication and circulation from the writing and imprinting of the work until it reaches the hands of the ultimate reader. As Mr. Justice Hughes said in *Lovell v. Griffin*, 303 U. S. 444, 452, quoting from *Ex Parte Jackson*, 96 U. S. 727:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation the publication would be of little value."

Concededly the term "obscene" is vague and unconfined. Accordingly, it is of the utmost importance that in this field government speak with one and not many voices. It is bad enough that federal departments disagree with one another[36] without adding the confusion of forty-eight states each separately declaring what is non-mailable because obscene. In *In re Debs*, 158 U. S. 564, the Court was concerned with state interference with the mails, observing:

> "If all the inhabitants of a state or even a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecution for such offenses had in such a community would be doomed in advance to failure and if the certainty of such failure was known and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the

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[36]In *Commonwealth v. Gordon*, 66 D. & C. 101, 117 (Pa., 1949), the court said: "Research discloses a curious but complete confusion between the Post Office and the Customs over what constitutes obscenity. No unanimity of opinion unites these two governmental services in a common standard. Books have cleared the port only to find the mails closed to them; others printed here have circulated freely while copies were stopped at the ports."

> mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state." (*Supra*, at 581-582.)

And so it is here. In *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853 (1947), the Appellate Department of the Superior Court adopted the Massachusetts definition of obscenity found in *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945), rejecting the federal rule as stated in *United States v. One Book Entitled Ulysses*, 72 F. 2d 705 (C. A. 2, 1934):

> "We do not assent to everything said in that [Ulysses] case which appears to have gone to the extreme of liberality in its interpretation of the statute in favor of the book."

In *Commonwealth v. Isenstadt, supra*, the book "Strange Fruit" was found obscene. Three years later the book "Forever Amber" was found by the same court to be not obscene. (*Attorney General v. "Forever Amber,"* 323 Mass. 302, 81 N. E. 2d 663 (1948). Two years later "God's Little Acre" was found to be obscene, the court conceding that the same book had been found not obscene in the States of New York and Pennsylvania. (*Attorney General v. God's Little Acre*, 326 Mass. 281, 285; 93 N. E. 2d 819 (1950).)

If then "God's Little Acre" is by federal standards mailable because not obscene and yet is obscene by state standards and a person convictable because he kept "God's Little Acre" for mailing, it is obvious that there would be state interference with federal control of the mails. It would be awkward, to say the least, to have books travel-

ing through the mails change their character from "obscene" to "non-obscene" as they travel in the mails from one state to another. In this area government should speak with one voice. This is only possible if there is a national standard for "obscenity" in mailing and keeping for mailing.

> "It is no longer possible that free speech be guaranteed federally and denied locally; under modern methods of instantaneous communication such a discrepancy makes no sense. If speech is to be free anywhere, it must be free everywhere, and a law that can be used as a spigot that allows speech to flow freely or to be checked altogether is a general threat to free opinion and enlightened solution. What is said in Pennsylvania may clarify an issue in California, and what is suppressed in California may leave us the worse in Pennsylvania. Unless a restriction on free speech be of National validity, it can no longer have any local validity whatever." (*Commonwealth v. Gordon, supra,* at 136.)

(3) Permitting a State to Punish for "Keeping for Sale by Mail" Obscene Books Presents a Serious Danger of Conflict With Federal Administration of the Federal "Obscenity" Statutes.

Plainly, different courts define and interpret obscenity in many different ways. This can only lead to conflict.

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." (*Garner v. Teamsters Union,* 346 U. S. 485, 490-491.)

> "Should the states be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned [in Garner v. Teamsters Union] but the added conflict engendered by different criteria of substantive offenses." (*Pennsylvania v. Nelson, supra*, at 509.)

Here we have "a multiplicity of tribunals . . . a diversity of procedures" (*Garner v. Teamsters Union, supra*, at 490), *and* an avowed "different criteria of substantive offenses." (*Pennsylvania v. Nelson, supra*, at 509.)

Conclusion.

For the reasons stated, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A.

The Platonic Creed—State Control of Moral Virtue.

PLATO

The Dialogues of Plato—The Republic, Book III

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 7, p. 334).

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I perceive, I said, that you have or have had experience of this sort, and I agree. But let me ask you another question: Has excess of pleasure any affinity to temperance?

How can that be? he replied; pleasure deprives a man of the use of his faculties quite as much as pain.

Or any affinity to virtue in general?

None whatever.

Any affinity to wantonness and intemperance?

Yes, the greatest.

And is there any greater or keener pleasure than that of sensual love?

No, nor a madder.

Whereas true love is a love of beauty and order—temperate and harmonious?

Quite true, he said.

Then no intemperance or madness should be allowed to approach true love?

Certainly not.

Then mad or intemperate pleasure must never be allowed to come near the lover and his beloved; neither of them can have any part in it if their love is of the right sort?

No, indeed, Socrates, it must never come near them.

Then I suppose that in the city which we are founding you would make a law to the effect that a friend should use no other familiarity to his love than a father would use to his son, and then only for a noble purpose, and he must first have the other's consent; and this rule is to limit him in all his intercourse, and he is never to be seen going further, or, if he exceeds, he is to be deemed guilty of coarseness and bad taste.

I quite agree, he said.

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SAINT THOMAS AQUINAS

The Summa Theologica

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 20, pp. 213-214).

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QUESTION XCII

Of The Effects Of Law

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. . . a law is nothing else than a dictate of reason in the ruler, by whom his subjects are governed. Now the virtue of any subordinate thing consists in its being well subordinated to that by which it is regulated. Thus we see that the virtue of the irascible and concupiscible faculties consists in their being obedient to reason; and accordingly the virtue of every subject consists in his being well subjected to his ruler, as the Philosopher says. But every law aims at being obeyed by those who are subject to it. Consequently it is evident that the proper effect of law is to lead its subjects to their proper virtue; and since virtue is "that which makes its subject good," it follows that the proper effect of law is to make those to whom it is given, good, either absolutely or in some particular respect. For if the intention of the lawgiver is fixed on true good, which is the common good regulated according to Divine justice, it follows that the effect of the law is to make men good absolutely. If, however, the intention of the lawgiver is fixed on that which is not good absolutely, but useful or pleasurable to himself, or

in opposition to Divine justice; then the law does not make men good absolutely, but relatively, that is, in respect to that particular government. In this way good is found even in things that are bad of themselves; thus a man is called a good robber, because he works in a way that is adapted to his end.

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APPENDIX B.

The Democratic Creed—Control of Moral Virtue as the Province of the People and Not of the State.

JOHN. MILTON

Areopagitica

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 32, pp. 390-391).

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How great a virtue is temperance, how much of moment through the whole life of man! Yet God commits the managing so great a trust, without particular law or prescription, wholly to the demeanour of every grown man. And therefore when He Himself tabled the Jews from heaven, that omer, which was every man's daily portion of manna, is computed to have been more than might have well sufficed the heartiest feeder thrice as many meals. For those actions which enter into a man, rather than issue out of him, and therefore defile not, God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser; there were but little work left for preaching, if law and compulsion should grow so fast upon those things which heretofore were governed only by exhortation. Solomon informs us, that much reading is a weariness to the flesh; but neither he nor other inspired author tells us that such or such reading is unlawful: yet certainly had God thought good to limit us herein, it had been much more expedient to have told us what was unlawful than what was wearisome. As for

the burning of those Ephesian books by St. Paul's converts; 'tis replied the books were magic, the Syriac so renders them. It was a private act, a voluntary act, and leaves us to a voluntary imitation: the men in remorse burnt those books which were their own; the magistrate by this example is not appointed; these men practised the books, another might perhaps have read them in some sort usefully.

Good and evil we know in the field of this world grow up together almost inseparably; and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many cunning resemblances hardly to be discerned, that those confused seeds which were imposed upon Psyche as an incessant labour to cull out, and sort asunder, were not more intermixed. It was from out the rind of one apple tasted, that the knowledge of good and evil, as two twins cleaving together, leaped forth into the world. And perhaps this is that doom which Adam fell into of knowing good and evil, that is to say of knowing good by evil. As therefore the state of man now is; what wisdom can there be to choose, what continence to forbear without the knowledge of evil? He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring Christian.

I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal

garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather; that which purifies us is trial, and trial is by what is contrary. That virtue therefore which is but a youngling in the contemplation of evil, and knows not the utmost that vice promises to her followers, and rejects it, is but a blank virtue, not a pure; her whiteness is but an excremental whiteness. Which was the reason why our sage and serious poet Spenser, whom I dare be known to think a better teacher than Scotus or Aquinas, describing true temperance under the person of Guion, brings him in with his palmer through the cave of Mammon, and the bower of earthly bliss, that he might see and know, and yet abstain. Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read.

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JOHN LOCKE

An Essay Concerning Human Understanding

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 35, p. 231):

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12. *Its enforcement is commendation and discredit.* If any one shall imagine that I have forgot my own notion of a law, when I make the law, whereby men judge of virtue and vice, to be nothing else but the consent of private men, who have not authority enough to make a law: especially wanting that which is so necessary and essential to a law, a power to enforce it: I think I may say, that he who imagines commendation and disgrace not to be strong motives to men to accommodate themselves to the opinions and rules of those with whom they converse, seems little skilled in the nature or history of mankind: the greatest part whereof we shall find to govern themselves chiefly, if not solely, by this *law of fashion*; and so they do that which keeps them in reputation with their company, little regard the laws of God, or the magistrate. The penalties that attend the breach of God's laws some, nay perhaps most men, seldom seriously reflect on: and amongst those that do, many, whilst they break the law, entertain thoughts of future reconciliation, and making their peace for such breaches. And as to the punishments due from the laws of the commonwealth, they frequently flatter themselves with the hopes of impunity. But no man escapes the punishment of their

MARIE JAHODA

(and the Staff of the Research Center for Human Relations, New York University, March 1, 1954).

The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate

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(Pp. 15-16):

We can now briefly summarize the psychological assumptions made in the public debate of the impact of "bad" books on the reader:

The affecting agent: There is little consensus on what constitutes a "bad" book beyond the tautological statement that a "bad" book is one that has a "bad" effect. However, implied in many statements is the notion that the description of socially disapproved behavior, particularly but not exclusively in the realm of sex, constitutes the affecting agent. Some persons claim that such descriptions are "bad" unless the author describes them in order to disapprove of them. Others maintain that the descriptions in themselves are objectionable, even if the author adds to them his own disapproval.

The nature of the effect: Here we find a wide variety of assumptions, ranging from *a deadening of sensitivities,* through *conveyance of an incorrect picture of the world,* to *a lowering of values and standards* and, finally, to *undesirable behavior such as sexual perversion, drug addiction or delinquency.*

The target audience: These effects are considered with regard to a variety of social groups, ranging from the normal adult to the susceptible and undesirably predisposed child.

censure and dislike, who offends against the fashion and opinion of the company he keeps, and would recommend himself to. Nor is there one of ten thousand, who is stiff and insensible enough, to bear up under the constant dislike and condemnation of his own club. He must be of a strange and unusual constitution, who can content himself to live in constant disgrace and disrepute with his own particular society. Solitude many men have sought, and been reconciled to: but nobody that has the least thought or sense of a man about him, can live in society under the constant dislike and ill opinion of his familiars, and those he converses with. This is a burden too heavy for human sufferance: and he must be made up of irreconcileable contradictions, who can take pleasure in company, and yet be insensible of contempt and disgrace from his companions.

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The arbiter: legally, a judge or jury are considered qualified to appraise a publication with respect to its content and potential effect. In addition experts in various disciplines of the human sciences have been heard in efforts to decide on such questions. Several privately organized groups, such as the N.O.D.L. [National Organization for Decent Literature], e.g., have relied on the judgment of a small group of interested adults.

It is, indeed, not surprising that the assumptions made by various people on the impact of "bad" books are often inconsistent with each other, unprecise and confusing. Psychological research concerned with other matters has amply demonstrated that judgments become less and less reliable, the more complex an issue is. Even in judging quite simple stimuli, individual variations occur. When there is ample scope for subjective considerations to enter into the judgment, as in the case at hand, agreement between various judges may be very slight.

Most of the sources and authorities quoted so far have relied on their personal psychological insights without raising the question of the reliability of their own judgments; hardly any have based their arguments on available research. * * *

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(Pp. 22-23):

Studies of delinquency have long pointed to the fact that important as personality predispositions are, they must coincide with other conditions in the environment in order to lead to delinquent behavior, which has a

MONTESQUIEU

The Spirit of Laws

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 38, pp. 90, 138).

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[Book XII. Of the Laws That Form Political Liberty, In Relation To The Subject].

13. *Of Writings.* In writings there is something more permanent than in words, but when they are in no way preparative to high treason they cannot amount to that charge.

And yet Augustus and Tiberius subjected satirical writers to the same punishment as for having violated the law of *maiestas*. Augustus, because of some libels that had been written against persons of the first quality; Tiberius, because of those which he suspected to have been written against himself. Nothing was more fatal to Roman liberty. Cremutius Cordus was accused of having called Cassius in his annals the last of the Romans.

Satirical writings are hardly known in despotic governments, where dejection of mind on the one hand, and ignorance on the other, afford neither abilities nor will to write. In democracies they are not hindered, for the very same reason which causes them to be prohibited in monarchies; being generally levelled against men of power and authority, they flatter the malignancy of the people, who are the governing party. In monarchies they are forbidden, but rather as a subject of civil animadversion than as a capital crime. They may amuse the general malevolence, please the malcontents, diminish the envy against public employments, give the people patience to suffer, and make them laugh at their sufferings.

But no government is so averse to satirical writings as the aristocratic. There the magistrates are petty sovereigns, but not great enough to despise affronts. If in a monarchy a satirical stroke is designed against the prince, he is placed on such an eminence that it does not reach him; but an aristocratic lord is pierced to the very heart. Hence the decemvirs, who formed an aristocracy, punished satirical writings with death.

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[Book XIX. Of Laws in Relation to the Principles Which Form the General Spirit, Morals, and Customs of a Nation].

We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws; this would have too much the air of tyranny: it would be better to change them by introducing other manners and other customs.

Thus when a prince would make great alterations in his kingdom, he should reform by law what is established by law, and change by custom what is settled by custom; for it is very bad policy to change by law what ought to be changed by custom.

The law which obliged the Muscovites to cut off their beards and to shorten their clothes, and the rigour with which Peter I made them crop, even to their knees, the long cloaks of those who entered into the cities, were instances of tyranny. There are means that may be made use of to prevent crimes; these are punishments: there are those for changing our customs: these are examples.

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need and attention of the reader. With regard to this self-selection of books, and in particular of the focus of attention, there is surely "neither good nor bad, but thinking makes it so."

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(P. 44):

* * * There is a large overlap in content matter between all media of mass communication. The daily press, television, movies, radio and fictional printed material all present their share of so-called "bad" material, varying in the degree of reality attached to these matters. It is virtually impossible to isolate the impact of one of these media on a population that is exposed to all of them. Some evidence suggests that the particular communications to which an individual exposes himself are probably in good part a matter of choice. The reader does not take in everything that is offered but mostly what he is predisposed to take. In the realm of attitudes, this means that adult people prefer to expose themselves to material which expresses attitudes they already hold. A conversation of attitudes by any of the mass media is indeed a rare event, if it occurs at all. Apparently, information is much more readily absorbed from the mass media than are attitudes which do not agree with those of the reader.

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EDWARD GIBBON

The Decline and Fall of the Roman Empire

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 40, p. 291).

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But the counsels of princes are more frequently influenced by views of temporal advantage than by considerations of abstract and speculative truth. The partial and increasing favour of Constantine may naturally be referred to the esteem which he entertained for the moral character of the Christians, and to a persuasion that the propagation of the Gospel would inculcate the practice of private and public virtue. Whatever latitude an absolute monarch may assume in his own conduct, whatever indulgence he may claim for his own passions, it is undoubtedly his interest that all his subjects should respect the natural and civil obligations of society. But the operation of the wisest laws is imperfect and precarious. They seldom inspire virtue, they cannot always restrain vice. Their power is insufficient to prohibit all that they condemn, nor can they always punish the actions which they prohibit. The legislators of antiquity had summoned to their aid the powers of education and of opinion. But every principle which had once maintained the vigour and purity of Rome and Sparta was long since extinguished in a declining and despotic empire.

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JOHN STUART MILL

On Liberty

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 43, pp. 272-3).

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. . . This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reason, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

THEODORE SCHROEDER

"Obscene" Literature and Constitutional Law
(1911) pp. 236-237.

PSYCHOLOGIC TENDENCY AS CRITERION OF GUILT.

Historically considered, an inseparable part of the contention for a larger, or an unabridged, liberty of speech and of the press was the condemnation of that practise in the prosecution for libels which made the guilt of the accused depend upon "the evils which may be imaginatively and prospectively attributed to the influence of his opinions." The opposition to this uncertainty in the criteria of guilt was not limited to persons who believed in unabridged freedom of speech, but was often very forcibly urged by those who desired only a little or no enlargement of intellectual opportunity. Even Blackstone believed that the criteria of guilt for heresy and seditious utterances should be made more certain.

The protest against the uncertainty of the tests of criminality in prosecutions for seditious and blasphemous utterances was upon two distinct grounds. The first and most general of these was the historical retrospect, and was an appeal to expediency. The argument ran thus: Books once condemned for their supposed evil tendencies are now believed to have been good and useful. In making the psychologic tendency of an utterance the test of its criminality, we are again opening the door for a repetition of such error. Therefore, such criminal laws are inexpedient and should be abolished. The second reason for objecting to the tendency-test in penalized utterances

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

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was from the point of view of that larger demand for liberty which was founded upon the idea that no freeman should be deprived of his liberty except by *lawful* judgment of his peers, or by the *law* of the land. This was predicated upon the conception that every man should in justice be forewarned that his act is penalized. It could not be the law of the land if it did not impart that advance information, and could not accomplish this except an exact statement of the criteria of guilt was a part of every criminal statute. By such means the lovers of Liberty hoped to obtain *freedom under law* in contradistinction to a mere liberty by permission under lawless despotism. To such persons, it was self-evident that a speculative opinion about the psychologic tendency of an utterance upon a future, undescribed, hypothetical, reader, or hearer, when used as a criterion of guilt, could be no restraint upon the moral idiosyncrasies, stupid bigotry, unreasoned hysterical apprehension, personal interest, or even the superstitious malice, of those charged with the duty of determining whether or not a verbal crime had been committed. It was seen that under such circumstances guilt must be determined by *ex post facto* standards, personal to the individuals passing judgment. This, it was argued, was government according to the lawless despotism of man, and the friends of freedom demanded as one of the conditions without which there could be no liberty of speech or press, or liberty of any sort, that the criteria of guilt be so certain that every man should know in advance, from the very letter of the law, by what

APPENDIX C.

The Impossibility of Identification of "Obscene" or "Indecent" Books and the Thoughts and Desires Which Such Books Stimulate.

WILLIAM JAMES

The Principles of Psychology

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 53, pp. 151-152).

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For there it is obvious and palpable that our state of mind is never precisely the same. Every thought we have of a given fact is, strictly speaking, unique, and only bears a resemblance of kind with our other thoughts of the same fact. When the identical fact recurs, we *must* think of it in a fresh manner, see it under a somewhat different angle, apprehend it in different relations from those in which it last appeared. And the thought by which we cognize it is the thought of it-in-those-relations, a thought suffused with the consciousness of all that dim context. Often we are ourselves struck at the strange differences in our successive views of the same thing. We wonder how we ever could have opined as we did last month about a certain matter. We have outgrown the possibility of that state of mind, we know not how. From one year to another we see things in new lights. What was unreal has grown real, and what was exciting is insipid. The friends we used to care the world for are shrunken to shadows; the women, once so divine, the stars, the woods, and the waters, how now so dull and

standard his conduct would be adjudged criminal. It goes without saying that so long as an *ex post facto* judicial guess as to the psychologic tendency of a speech, book, or picture is the test of guilt, there can be no such thing as *liberty under the law*. Even from those to whom "free speech" meant a limited liberty by permission, there came a protest against tyranny, and the demand for the freedom of every man's opinion from that arbitrary power for the penalizing of words by standards of an *ex post facto* guess or pretense about "the evils which may be imaginatively and prospectively attributed to the influence of his opinions."

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common! the young girls that brought an aura of infinity, at present hardly distinguishable existences; the pictures so empty; and as for the books, what *was* there to find so mysteriously significant in Goethe, or in John Mill so full of weight? Instead of all this, more zestful than ever is the work, the work; and fuller and deeper the import of common duties and of common goods.

But what here strikes us so forcibly on the flagrant scale exists on every scale, down to the imperceptible transition from one hour's outlook to that of the next. Experience is remoulding us every moment, and our mental reaction on every given thing is really a resultant of our experience of the whole world up to that date.

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APPENDIX D.

The Societal Values in Freedom of Speech and Press.

JOHN MILTON

Areopagitica

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 32, pp. 389-390, 399).

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. . . To the pure, all things are pure; not only meats and drinks, but all kind of knowledge whether of good or evil; the knowledge cannot defile, nor consequently the books, if the will and conscience be not defiled.

For books are as meats and viands are; some of good, some of evil substance; and yet God, in that unapocryphal vision, said without exception, Rise, Peter, kill and eat, leaving the choice to each man's discretion. Wholesome meats to a vitiated stomach differ little or nothing from unwholesome; and best books to a naughty mind are not unappliable to occasions of evil. Bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate. Whereof what better witness can ye expect I should produce, than one of your own now sitting in Parliament, the chief of learned men reputed in this land, Mr. Selden; whose volume of natural and national laws proves, not only by great authorities brought together, but by exquisite reasons and theorems almost mathematically demonstrative, that all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest. I conceive, therefore, that when God did enlarge the universal diet of man's body, saving ever the rules of temperance, He then also, as before, left arbitrary the dieting and repasting of our minds; as

SIGMUND FREUD

New Introductory Lectures on Psycho-Analysis
(from *A General Introduction to Psycho-Analysis*, p. 449).

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 54, p. 839).

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When you think of this dividing up of the personality into ego, super-ego, and id, you must not imagine sharp dividing lines such as are artificially drawn in the field of political geography. We cannot do justice to the characteristics of the mind by means of linear contours, such as occur in a drawing or in a primitive painting, but we need rather the areas of colour shading off into one another that are to be found in modern pictures. After we have made our separations, we must allow what we have separated to merge again. Do not judge too harshly of a first attempt at picturing a thing so elusive as the human mind. It is very probable that the extent of these differentiations varies very greatly from person to person; it is possible that their function itself may vary, and that they may at times undergo a process of involution.

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wherein every mature man might have to exercise his own leading capacity.

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Truth and understanding are not such wares as to be monopolised and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and licence it like our broadcloth and our woolpacks. What is it but a servitude like that imposed by the Philistines, not to be allowed the sharpening of our own axes and coulters, but we must repair from all quarters to twenty licensing forges? Had anyone written and divulged erroneous things and scandalous to honest life, misusing and forfeiting the esteem had of his reason among men, if after conviction this only censure were adjudged him that he should never henceforth write but what were first examined by an appointed officer, whose hand should be annexed to pass his credit for him that now he might be safely read; it could not be apprehended less than a disgraceful punishment. Whence to include the whole Nation, and those that never yet thus offended, under such a diffident and suspectful prohibition, may plainly be understood what a disparagement it is. So much the more, whenas debtors and delinquents may walk abroad without a keeper, but unoffensive books must not stir forth without a visible jailer in their title.

Nor is it to the common people less than a reproach; for if we be so jealous over them, as that we dare not trust them with an English pamphlet, what do we but censure them for a giddy, vicious, and ungrounded people; in such a sick and weak state of faith and discretion, as to be able to take nothing down but through the pipe of a licenser?

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WESTON LA BARRE

Obscenity: An Anthropological Appraisal

(in Law and Contemporary Problems, Vol. 20, 1955, Published by School of Law, Duke University, pp. 539-542).

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In the matter of nudity of the body or of body-parts in females, our male-dominated society is, perhaps understandably, ambivalent. Characteristically, in the case of a "living statute" display at the Chicago World's Fair, the law, with sensitive fidelity to the mores, decided that the exposure of both breasts was "obscene," but that the exposure of only one was "art," thus satisfying both church-goers and art-connoisseurs. Two decades ago, it was still being argued whether, with safety to public morals, the male torso might be exposed above the waist on bathing beaches; but for some centuries in our society, the ultimate obscenity has been the display of male genitals, or even their representation in painting and sculpture. Many Malayan and southeast Asiatic peoples are even more rigorous in this respect and do not permit the exposure of male nudity even before other males. The intensity of this repression is shown by the powerful projective sanction of the "evil eye" in which seeing the person does damage to him. But it is impossible to maintain that the total nudity in males of all ages among such people as the Nilotic Nuer can ever have any implication of obscenity to the Nuer themselves. . . . The total nudity of one sex but not the other is, of course, a commonplace in ethnological accounts, as is also nudity at one age but not another, or nudity of some status-group but not another, or in one social or religious context but not another. . . .

The total or partial nudity of the female body is quite as much a commonplace among peoples of the world. It may be didactically useful, perhaps, to emphasize the atypicality in obscenity-sense of our own tribe: In far and away the majority of peoples of the world and on all continents, the exposure of the breast in nursing a child is quite without any connotation of obscenity whatever, nor is permanent exposure above the waist in women. Indeed, in ancient India, uncovering the breasts was a sign of deference to men on the part of lower-caste women and a sign of respect to superiors. That such modesty-sense regarding the breasts is almost wholly European is indicated by the Marotse practice of covering the bosom with a mantle when a strange European approaches, though ordinarily this mantle is worn across the back; such behavior is a direct and clear artefact of European missionary attitudes.

Also, it is quite plain that modesty sense by no means always pertains to the genitalia. The famous story is told by Sir Richard Burton of a Moslem woman in Africa who accidentally fell off a camel. Her skirts were around her head, but her husband regarded the contretemps with equanimity. It was no matter that other men knew that his wife was female—for had she not kept her face covered? Curiously, among the Touareg, it is the men who are veiled and do not expose the face, even before other men in eating. A Haida Indian woman is embarrassed to be caught by a strange man without her labret or lower lip plug. Among many Negro groups in Africa, pro-

priety requires the buttocks to be covered, not the genitals. Philippine Islanders and Samoans think it indecent for the navel to be exposed, though every other part may go uncovered. In China, it is an obscenity for a woman to expose her artificially deformed feet to a strange man. Foot modesty is probably a very ancient Asiatic pattern, for it is found also among the Siberian Koryak, and an Eskimo woman in her igloo may be stripped down to a tiny Bikini skin garment before strange men if only she keeps her boots on, since removal of the boots has a sexual connotation. Among the Canary Islanders, a people isolated perhaps from Neolithic to early modern times, it was immodest for a woman to expose her breasts or feet. The Koryak regard it as deeply sinful to look upon the face of a dead person. Ainu women cover the mouth when speaking to a man. Some of the body parts involved with modesty seem strange indeed. Rameses III (1198-1167 B. C.) boasted in one of his inscriptions that his rule was so successful that he had made it possible for an Egyptian woman to go anywhere she liked *with her ears exposed,* and no stranger would molest her. The Japanese have erotized the nape of a woman's neck.

With respect to obscene or publicly prohibited *acts,* there is the same lack of universality in what we happen to regard as obscenity. We have already seen that public coitus, repeatedly attested to in firsthand accounts, is by no means unknown in Oceania, though normative ethicists would make this perhaps the very first of obscenities "universally" abhorred by all peoples of the world. Nor

among physiological acts is it only coitus that is obscene in public contexts. In some cases, *eating* is an obscene act when performed in the presence of other people or in public; and the same Tahitians who copulated in public would eat separately and privately. The Maldive Islanders ate always in solitude, retiring for this purpose to the innermost part of the house and covering the windows lest passersby observe them; the practice is reported for other Oceanic peoples as well. Many of the "divine kings" in Africa and elsewhere, collected by Sir James G. Frazer in a volume of *The Golden Bough,* never ate in public; perhaps some of the same reasons are involved in the fact that the Pope never dines in public, nor does an American admiral on his flagship.

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ALBERT ELLIS, Ph.D.

The Folklore of Sex

(1951) pp. 138-139, 142-143.

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Besides Broadway and Hollywood productions, other kinds of shows also make lavish use of lasciviousness. Night-club acts, for instance, are notoriously sexier than almost any other kind of performance. Beauty pageants, county fairs, business exhibitions, circuses, and numerous other kinds of shows also make excellent use of lasciviously displayed feminine charms and racy humor. *Picture Show*, illustratively, contains an article entitled "Should the New World's Fair Sell Sex?" This article frankly tells how the last World's Fair at New York was so sparsely populated during its first year that "it was almost possible to shoot deer and bear on the grounds, so scarce were humans. Then somebody had an inspiration for the second year, a brain storm that acted like adrenalin on worried bondholders: put in girls, and invite Broadway producers like Mike Todd, George Jessel, and famed Billy Rose to do their stuff. From then on, things hummed at the box office as Gypsy Rose Lee, Rosita Royce, the natating and extremely beautiful Eleanor Holm did their stuff for the suddenly interested crowds."

In addition we have the never-ending herculean labors of American advertisers to sell everything from chewing gum to sex books with the most inviting palaver and pictures imaginable. If the average American male never read a story, saw a play or a movie, nor listened to a radio or television show, he would still be so overwhelmed by sexiness in newspaper, magazine, transportation, billboard,

and other ads that his daily sex temperature would still tend to rise many degrees every time he viewed a good copywriter's handiwork.

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Having sufficiently belabored the point that examples of lasciviousness are rampant in American fiction, non-fiction, movies, plays, advertisements, and humor, what may we conclude? Clearly that the diatribes against lust, lewdness, and lasciviousness which heavily stud the religious writings of today are having little or no overt effect on the sensuous attitudes and actions of millions upon millions of American citizens. Inwardly, it may well be imagined, these anti-lascivious attitudes of a highly vocal minority are having an appreciable effect: since the fact that our countrymen are so *overly* eager to participate in lusty enjoyments of all types raises the suspicion that they find special adventure and excitement in them which are born of their forbidden-fruit nature.

That is to say, if moralists did not fret and fume about directly expressed sex desire and participation, it is doubtful if the sexuality indirectly expressed in the widespread patronizing of pin-up photos, risqué stories, sex-tinged gadgets, et cetera, would be a fraction as popular as it obviously is today. Sexual lasciviousness seems to be at least partly a function of sexual anti-lasciviousness, and most normal men who carry the seeds of the latter concomitantly reap the crops of the former.

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variety of causal conditions, not a single one. In its most general form this insight obtained here has been formulated as a general psychological law by Kurt Lewin: Behavior is always a function of both personality and environment. Though we have demonstrated that the personality predispositions to crime can hardly be created by reading matter, it remains to be seen whether reading matter forms a significant part of the environmental conditions which, together with a certain personality, leads to crime.

Again, in the literature on the environmental conditions related to delinquency, the impact of bad books is only rarely mentioned if at all. Rather there are in the focus of research matters such as economic deprivation, disturbing personal experiences such as are often the result of broken homes, harsh and severe parents as well as over-protective parents, the influence of juvenile gangs, etc.

The emphasis on such direct experiences as they are shaped by environmental conditions is, again, not accidental. Implied in such findings is a broader principle: *direct experiences have a much greater directive power on human behavior than do vicarious experiences.* Evidence for the operation of this principle comes from a wide range of areas in human conduct.

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(P. 30):

As we now proceed to examine the nature of the experience that results from reading fiction, it must be kept in mind that much the same experience—and perhaps on a more intensive level—is provided by newspaper accounts in "human-interest" stories where the reality character of the event is clearly perceived; and by radio, movies and television which put lesser demands both on the skills and the imagination of the audience.

The first question which arises: who reads what? can hardly be answered specifically without much more research, and research focused on content matter and forms of presentation rather than on different media and on broad classifications such as fiction, biography, mysteries, etc. On a less specific level, however, there is converging evidence from a variety of sources for this answer: people read what they like, or, in other words, what fits their predispositions, personalities and interests.

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(P. 32):

To the extent that this principle of self-selection operates in the choice of reading matter, personality factors discussed in a previous section must be assumed to enter into the impact of books. In other words, what a reader gets out of a book is largely determined by what he brings to it. It is well known that, on occasion, dictionaries, encyclopedias and other neutral material can supply what "bad" books are said to supply, because of the selective

MACAULAY

Critical and Historical Essays

(1843, Vol. III, p. 256)

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We cannot wish that any work or class of works which has exercised a great influence on the human mind, and which illustrates the character of an important epoch in letters, politics and morals, should disappear from the world. If we err in this matter, we err with the gravest men and bodies of men in the empire, and especially with the Church of England and with the great schools of learning which are connected with her. The whole liberal education of our countrymen is conducted on the principle that no book which is valuable, either by reason of the excellence of its style or by reason of the light which it throws on the history, polity and manners of nations, should be withheld from the student on account of its impurity. The Athenian Comedies, in which there are scarcely a hundred lines together without some passage of which Rochester would have been ashamed, have been reprinted at the Pitt Press and the Clarendon Press under the direction of Syndics and delegates appointed by the Universities, and have been illustrated with notes by reverend, very reverend and right reverend commentators. Every year the most distinguished young men in the kingdom are examined by bishops and professors of divinity on the *Lysistrata* of Aristophanes and the *Sixth Satire* of Juvenal. There is certainly something a little ludicrous in the idea of a conclave of venerable fathers of the Church rewarding a lad for his intimate acquaintance with writings compared with which the loosest tale in Prior is modest.

But, for our own part, we have no doubt that the great societies which direct the education of the English gentry have herein judged wisely. It is unquestionable that an extensive acquaintance with ancient literature enlarges and enriches the mind. It is unquestionable that a man, whose mind has been thus enlarged and enriched, is likely to be far more useful to the State and to the Church than one who is unskilled, or little skilled, in classical learning. On the other hand, we find it difficult to believe that, in a world so full of temptation as this, any gentleman, whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them. A man who, exposed to all the influences of such a state of society as that in which we live, is yet afraid of exposing himself to the influences of a few Greek or Latin verses, acts, we think, much like the felon who begged the sheriffs to let him have an umbrella held over his head from the door to Newgate to the gallows because it was a drizzling morning and he was apt to take cold. The virtue which the world wants is a healthful virtue, not a valetudinarian virtue—a virtue which can expose itself to the risks inseparable from all spirited exertion—not a virtue which keeps out of the common air for fear of infection and eschews the common food as too stimulating. It would be indeed absurd to attempt to keep men from acquiring those qualifications which fit them to play their part in life with honour to themselves and advantage to their country, for the sake of preserving a delicacy which cannot be preserved—a

delicacy which a walk from Westminster to the Temple is sufficient to destroy.

But we should be justly chargeable with gross inconsistency if, while we defend the policy which invites the youth of our country to study such writers as Theocritus and Catullus, we were to set up a cry against a new edition of *The Country Wife* or *The Way of the World*. The immoral English writers of the seventeenth century are indeed much less excusable than those of Greece and Rome. But the worst English writings of the seventeenth century are decent compared with much that has been bequeathed to us by Greece and Rome. Plato, we have little doubt, was a much better man than Sir George Etherege. But Plato has written things at which Sir George Etherege would have shuddered. Buckhurst and Sedley, even in those wild orgies at the Cock in Bow Street, for which they were pelted by the rabble and fined by the Court of King's Bench, would never have dared to hold such discourse as passed between Socrates and Phaedrus on that fine summer day under the plane-tree. . . .

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JOHN STUART MILL

On Liberty

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 43, pp. 284, 322).

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But when we turn to subjects infinitely more complicated, to morals, religion, politics, social relations, and the business of life, three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it. The greatest orator, save one, of antiquity, has left it on record that he always studied his adversary's case with as great, if not still greater, intensity than even his own. What Cicero practiced as the means of forensic success requires to be imitated by all who study any subject in order to arrive at the truth. He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment. and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination. Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost

for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions. Their conclusion may be true, but it might be false for anything they know: they have never thrown themselves into the mental position of those who think differently from them, and considered what such persons may have to say; and consequently they do not, in any proper sense of the word, know the doctrine which they themselves profess.

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The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of *their* mental expansion and elevation to a little more of administrative skill, or of that semblance of it which practice gives, in the details of business; a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.

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MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS
House of Delagates, Session of 1790-1800

(In Elliot's Debates in the Several State Conventions on the Adoption of the Federal Constitution, published by J. B. Lippincott Company, 1907, pp. 569, 570, 571.)

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The freedom of the press, under the common law, is, in the defences of the Sedition Act, made to consist in an exemption from all previous restraint on printed publications, by persons authorized to inspect or prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

The essential difference between the British government and the American constitutions will place this subject in the clearest light.

In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger

from the executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people,—such as their Magna Charta, their bill of rights, &c.,—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpation. Under such a government as this, an exemption of the press from previous restraint by licensers appointed by the king, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States.

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The last remark will not be understood as claiming for the state governments an immunity greater than they have heretofore enjoyed. Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press. It has accordingly been decided, by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any one who reflects that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflects that to the same beneficent source the United States owe much of the lights which conducted them to the rank of a free and independent nation and which have improved their political system into a shape so auspicious to their happiness?

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THOMAS JEFFERSON

A Bill for Establishing Religious Freedom

(in The Works of Thomas Jefferson, Federal Edition, Vol. II, pp. 438-441).

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SECTION I. Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet choose not to propagate it by coercions on either, as was in his Almighty power to do, but to exalt it by its influence on reason alone; that the impious presumption of legislature and ruler, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that

even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards; which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; and therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust or emolument, unless he profess or renounce this or that religious opinion, is depriving him injudiciously of those privileges and advantages to which, in common with his fellow-citizens, he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminals who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or suffer from his

own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

SECT. II. We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

SECT. III. And though we well know that this Assembly, elected by the people for their ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right.

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Sam [redacted]
William [redacted]
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

In appellant's opening brief, it was urged that the statute here, as construed and applied, violated free speech and press because it establishes such unconfined and vague standards as to vest censorial powers in officials of government, authorizing them in their arbitrary discretion to punish or permit the exercise of these fundamental freedoms protected by the First and Fourteenth Amendments.

The appellee has failed to meet this crucial issue. Far from discussing the question of the breadth and scope of this state law as applied to art and literature, and its validity under the Constitution in the light of history and

precedent, appellee in its brief virtually concedes that it is unable to justify the statute on this basic score.

Thus, with only a passing reference in a footnote, appellee rejects the settled construction of this "mental obscenity" statute by the California courts as "pure dictum," as neither a "construction" nor an "interpretation." As we demonstrate hereafter, the appellee is quite in error. The appellee is compelled to take this unsupportable position because it is plainly impossible for it to maintain that a statute which makes it a crime to write, publish or distribute any book which "has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire" is not a thought statute, so broad and unconfined as to vest censorial powers unconstitutionally in officials of government.

The expedient gloss which the appellee now attempts to place upon these proceedings only accentuates the infirmities inherent in this "obscenity" statute. On the one hand, the appellee attempts to reconstruct the legislation in such manner as to only deepen the indefiniteness and limitless scope of the law. The appellee affirms that the "obscenity" law is directed not only at any book which stimulates readers "erotically," but at books which cause the readers to react with "repulsion and disgust" (A. B. 22.)* Thus, appellee's improvised construction of the law would punish not only books which inculcate sexually "impure" thoughts or desires, but those which offend the tastes of their readers. Such an arbitrary and vagrant standard would again place virtually all of art and literature at the mercy of every "village tyrant." That

*We thus refer to the brief for the appellee.

the statute as thus construed would offend the provisions of the Fourteenth Amendment appears plain. But what appellee has succeeded in doing is demonstrating how these "mental obscenity" statutes do operate in practice, for prosecutors, judges and juries are really unable to decide what writing or print will incite a "lascivious" thought or "lustful" desire. All that they can decide is that they "don't like it."

On the other hand appellee attempts at other places in its brief to treat the statute here as if it were some narrowly drawn statute where defined criminal conduct had been made an ingredient of the offense; where the class of readers has been limited; and where the type of utterance, specifically delineated, had been brought into immediate nexus with the proscribed conduct. The initial difficulty with appellee's position is that that is not the statute here, neither on its face nor as construed and applied. Moreover, appellee's argument is solely abstract and shot-gun in character, pointing in all directions at one and the same time without establishing the specific application of the concepts it enunciates to the particular law or charge under which appellant was convicted.

Thus, appellee speaks of the "strong presumption of constitutionality" (A. B. 19) without relating this supposed concept to the question of a state law avowedly abridging the exercise of speech and press. Appellee urges respect for the "legislative findings of fact" (A. B. 19), without explaining how *Butler v. Michigan* could have been written in the light of appellee's argument, and without discussing how the broad and vague censorial terms of this little Comstock statute enacted in the middle of the 19th Century can be today held compatible with the pro-

ten by Dr. Nicolas Venette in 1688, entitled *Tableau de l'Amour Conjugal, ou la Generation de l'Homme.* By 1712, this work was already in its 9th edition. There was an edition put out in Amsterdam in 1745, another in 1778, and a French edition appeared as late as 1924. We have appended to this brief a copy of the translator's foreword and the author's preface which appear with the treatise. They speak for themselves, as do the contents of this scientific treatise written by a devout and principled scholar on a subject of the highest importance to mankind.

Related observations could be made about the writings of Dr. D. O. Cauldwell,* which the trial court itself stated were not obscene [R. 88], but which appellee insists are "very obscene." "She Makes It Pay" [Ex. 9; R. 36, 64] is a study of the psychological inhibitions built up in a man during his life, so as to prevent him from engaging in normal sex relations. "Witch on Wheels" [Ex. 9; R. 36, 64] is the story of a promiscuous woman who threw in her lot with a notorious gambler, only to find with his death that she had lost both the man she loved and the chance to start anew. "Sword of Desire" [Ex. 11; R. 38, 64] is the story of the sexual methods used and the aid given to a legislative committee by a psychiatrist in uncovering a vice ring [R. 90].

It is submitted that the case herein demonstrates, if no other evidence were available, the vice of the censorial statute here involved.

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*"Questions and Answers About Oragenital Contacts" and "Petting As An Erotic Exercise" [Ex. 5; R. 27-28, 64].

visions of the Constitution and this Court's recent interpretation thereof, whatever may have been the motives or the assumed "findings" of the legislators. Appellee speaks of the concept of "clear and present danger of criminal conduct" (A. B. 19), without showing how this question of law is involved in this statute or in these proceedings, and without defining what "criminal conduct" is envisaged or what "obscene matters" present a "danger" of such conduct (A. B. 19).

Proceeding in another direction, appellee argues that the writing, publishing and sale of books which arouse "lustful desire" or "lascivious thoughts" are properly punishable, "entirely aside from the matter of inciting the user to overt sex crimes" (A. B. 26). The reasons given for this position are first, that "most women" are repelled and disgusted with such books (A. B. 22); second, that "some men" with "cultivated standards of a degree of nicety" are also repelled (A. B. 22); third, that a "child" reacts with "extreme shock and terror" (A. B. 22); and fourth, that the "vast majority of parents" do not wish their children exposed to "it," but react with "extreme displeasure if the possibility of such contact occurs" (A. B. 24). Thus, at one and the same time, appellee struggles to inject "clear and present danger of criminal conduct" into the proceedings, and then labors with equal vigor to remove all elements of unlawful conduct from the case in order to enlarge "obscenity" to include "bad taste" as well as "sexually impure ideas." Aside from the fact that this statute is not limited to "women" or "children" or "parents"; aside from the patent constitutional invalidity of appellee's argument on either term, it is submitted with all due deference to appellee that the standards which society at large sets

for the viewing of art or the reading of literature cannot be measured by the standards of "parents" or "children" or other segments of the population. Society has an interest in freedom of expression which may not necessarily be shared by the family or other individual groups.* We question, of course, the validity of appellee's conclusions as to the reactions of adult readers, or young people, to the reading of erotic literature. The widespread acceptance, reading and viewing, as well as discussion, of sexual matters in books, newspapers, magazines, television and motion pictures appear to indicate more wholesome and tolerant reactions than appellee would allow, even if appellee's conjectures were legally relevant here.

Finally, proceeding in a third direction, appellee urges that the history of the past should be disregarded, that however critically harmful to society has been the vague and unconfined standard which this statute now embodies, still as long as "courts sit" it need not be feared that the same standard will be misapplied; that indeed the standard is now "workable" and American courts make the standard applicable to "works of pornography" only and never to "works of any literary value" (A. B. 37); and that in any event, in this particular case, no injury has been done for the "degree of obscenity" (A. B. 49) of this material is so great that delicacy even forbids quotation

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*It is not uncommon for young people to do a great deal of reading of books which their parents are unable to prevent. It might be argued that "parents" should have the freest opportunity to peruse all literature so that they could more intelligently and pesuasively advise their children on the latter's choice of reading material. But the ordinary father or mother, *qua* such, is not qualified to act as censor within society at large, or to decide what literature or art may be displayed before the general public.

IV.

The Federal Government Has Preempted the Field of "Keeping for Sale by Mail" Alleged Obscene Literature.

Appellant's opening brief urged that Congress plainly intended to occupy the field of keeping for sale by mail of "obscene" books and advertisements, to the exclusion of the States (App. Br. 108-120). Appellee does not meet the issues presented (A. B. 62-64) and so we make no additional reply.

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

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SAM ROSENWEIN,
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Of Counsel.

"from exhibits to illustrate their indubitable obscenity" (A. B. 49).

But if the standard of criminality enunciated in a statute is incomprehensible, unconfined and indefinite, if the complaint is that judges and juries act under no legal standards at all, but simply enact legislation *ad hoc* in each case retroactively and without leaving any room for appellate review on the ultimate issue, it is difficult to understand how the fundamental rights of an accused will ever be protected by the judicial process. Courts can right wrongs when the defined standards of the law have been misapplied; they cannot legally undo harm which they have themselves been compelled to share by reason of the exercise of an arbitrary power vested in them by the legislature.* Moreover, as we demonstrate hereafter, it is simply not correct for appellee to assert that the censorship of works of literary merit has not occurred in modern times under the vague standards of "obscenity" statutes. The exact opposite is the case as appellee's own citations establish. Finally, while appellee cannot successfully contend that the particular application of the statute can save it from constitutional infirmity if it is otherwise invalid on its face and as construed, still appellant proposes to show how appellee even on this issue has been compelled by reason of its untenable position to distort the record and to cast the epithet of "obscenity" on books which have as much right, indeed importance, in the marketplace of ideas as any which appellee may deem "meritorious."

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*See *Roth v. Goldman*, 172 F. 2d 788 (C. A. 2, 1949) at 789.

I.

Unconfined and Arbitrary Censorship and Abridgement of Freedom of Speech and Press Are Not Valid or Reasonable Means for the Exercise of Alleged Police Powers of a State.

The statute here is not a *Chaplinsky* statute. Nor is it a statute regulating the sale of liquor or the height and weight of motor trucks on state highways. This is not a statute which purports to punish the commission of defined sexual offenses, or the incitement or coercion thereto. This is not a breach of peace or disorderly conduct statute which has been applied to utterances or writings immediately provoking injurious conduct. The statute here is limited solely to "obscene and lascivious thoughts and desires." The law as construed would apply to virtually every book and work of art and the sole criterion is the effect of such art and literature on the minds of readers and viewers as a judge or jury may conjecture, be such readers or viewers "adults," "parents," "children," "men" or "women." The law is as long as it is wide, and the sole issue here is whether *such a law* can, consistent with the Constitution, be upheld as a valid exercise of the police power of a State.

The appellee has been unable to produce a single precedent from this Court's decisions which supports the view that under the guise of protecting "the order, safety, health, morals and general welfare of its citizens" (A. B. 11), a State may establish a broad system of censorship and without restraint limit the exercise of speech and press. Appellee cannot do so because the decisions of this Court in such cases as *Stromberg*, *Cantwell*, *Thornhill*, *Carlson*, *Largent*, to name only a few, point in the op-

posite direction (App. Br. 75-76, n. 27).* "Where the First Amendment applies, it is a denial of all governmental power in our Federal system." Mr. Justice Frankfurter, concurring in *Marsh v. Alabama*, 326 U. S. 501, 511.

Appellee strings together a series of arguments to support its view that the legislature may reasonably have concluded that books which arouse "lustful desire" or incite "lascivious thoughts" present a clear and present danger of "resulting criminal conduct" (A. B. 17). Thus, it is urged that despite all of the known scientific authority which questions the causative influence of books on "sexually impure" ideas or acts, still there are some who hold a contrary view; that unless the legislature is "clearly wrong," its enactments must "strongly [be] presumed to be constitutional" (A. B. 18); that the existence of "obscenity" statutes in 47 states itself shows that there must exist facts warranting the conclusion of the state legislature that the "uncontrolled and unrestricted distribution and sale" of "obscene" material would lower the "moral standards of its populus and would directly affect a substantial number of its citizens" (A. B. 12-13); and that this Court cannot take "judicial notice" of any contrary view by scientific authorities unless they are in substantial agreement (A. B. 20).

But if it be assumed that all which appellee maintains aforesaid cannot be questioned, and that the legislature has "found" everything which logic and science may deny, still appellee has made not the slightest effort in its entire brief to support the validity of this broadly construed statute, with its wide interdiction of art and

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*We thus refer to Appellant's Opening Brief.

such circumstances and, being evicted from the genitalia, take up its residence in the mouth. Not what one did but what one said was the mark of decorous gentlefolk, and in the realm of sex this distinction was of course emphasized enormously.

For centuries the Church had taken it upon itself to tell the people exactly what they should do, or more often what they should *not* do, in matters sexual, basing its dicta for the most part on the maunderings of some feeble-minded eunuchoid old men of bygone times who either had been disappointed in love, too chicken-hearted to take a try at it, or physically incapable of indulging in it. Happy, as always, to have its thinking done for it, the law for the most part took over, with an enormously verbose lack of criticism, the findings of the Church on sex matters and enforced them with a severity and invariability possible only where intelligence is completely lacking.

But to these two long-standing, all-powerful, and utterly dogmatic vested interests was being added a third authority—that of science. Religion, science, and jurisprudence (law in its origin having largely been a matter of divining the guilty one and assessing an appropriate penalty) are all children of primitive magic, and by the 17th century none of them had got far from mother's apron-strings. The ducking-stool, the trial by combat, the chastity tests, and the like that the law employed to discover guilt were just as magical as the mumbled incantations and crucifix-amulets that the Church employed to drive off the Devil and the philtres that the doctors hopefully administered to cure impotence.

For any real progress, it was apparent that science, and medicine as part of it, had sooner or later to break with

literature. No state legislature can exceed constitutional limitations in the exercise of its police powers. However much a legislature may be convinced that "evil" exists, it cannot enact legislation allegedly designed to deal with the narrow evil by broadly and unconfinedly depriving persons of their fundamental freedoms. If appellee's position be sound, that all state "obscenity" statutes must be held constitutionally valid, no matter how broad, simply because the legislature must be deemed to have found facts warranting the enactment of the statutes, then *Butler v. Michigan*, 352 U. S. 380, could not have been written. The Michigan legislature may have "found" that "obscene" literature sold to an adult would find its way to young people who might be "corrupted," but that did not justify a law punishing the sale of any book containing "obscene" language to an adult, simply because the book would have a potential effect on a youthful reader. The reason why such statute could not be justified as an exercise of the police power of the State was because it would thereby arbitrarily curtail "one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Butler v. Michigan, supra*, at 384. Nor indeed, on appellee's terms, and in other related fields, could have *Winters*, *Burstyn* or *Thornhill* have been written.

In fact, appellee cannot support its position here without finally being driven to take the view that all books which incite "lascivious thoughts" or arouse "lustful desire" are punishable as a "legitimate exercise of the police power" because they are "disgusting," "repulsive" and "frightening" (A. B. 22-24). Appellee makes it clear that the

its brothers. An error insisted upon may serve religion, or enforced may serve law, but it can never be made *true* for science. But the break was difficult in the extreme. The dogma of centuries cannot be thrown off in a few years—indeed, it is far from completely thrown off to this day. The only thing that can take the place of dogma is observation and interpretation of experience, and this of necessity comes slowly. Also, such a break with establshed authority was dangerous, for scientists are men, and usually solitary men with no powerful associations, who may be drawn and quartered or burned at the stake for letting their thinking stray too far from the regimented line, and this again made scientific progress exceeding y slow and cautious.

Toward the end of the 17th century the picture was somewhat altered. With none too good grace the Church had conceded that the Earth was round and grudgingly admitted that perhaps the stars and sun did not revolve about it after all. Scientists were patiently advancing their groping theories and living to tell about it. But on the science of sex the Church did *not* relax its stand, and has not to the present, and in this it was pretty thoroughly abetted by the formalized prudery and innate sex-shyness of the majority of the people, those who had most to gain personally by advances in the field. Many sex offenses were still being punished (and on slight evidence in many instances) by the Biblical penalty of death by fire, and sober judges seriously pondered over charges that certain children were the offspring of the cohabitation of a demon with its mother! Indeed, one cannot help wondering that if, in the dim future, enlightenment might ever draw close to completion, which would be the final refuge of superstition, religion or sex?

statute is not directed at conduct, or utterances which directly coerce or incite to such conduct. It emphasizes that it puts to one side "the matter of inciting the user to overt sex crimes" (A. B. 26). The end result is that we have here, on appellee's own terms, the broadest and vaguest form of censorial statute. The standard is so indefinite and incomprehensible as to make possible the arbitrary abridgement of speech and press in totally unfettered fashion. The overhanging threat to freedom inherent in this statute is made palpable by appellee itself.

That such a statute with such a standard offends the Constitution can hardly be doubted, it is respectfully submitted. That the statute is perforce unreasonable and arbitrary would appear to be a necessary corollary. Appellee itself concedes that the "evil" which it seeks to prevent—acts or thoughts of sexual misbehavior caused by the reading of books—has little scientific support. Indeed, it cites not a single authority specifically supporting its view (*Cf.*, App. Br. 64-70). Reliance on the presence of other state "mental obscenity" statutes overlooks the common background of these laws, stemming as they did from the mid-Victorian era of the 19th Century without common law or early American experience (App. Br. 54-61, 85-87). Moreover, appellee overlooks the more contemporary decisions of this Court broadening and deepening the significance of the constitutional guarantee of freedom of speech and the press (App. Br. 62-63).

As against this tenuous and insubstantial "evil" as predicated by appellee should be balanced the wide inroads which a statute such as the one herein can and does make in the fields of literature and art, in thoughts, ideas, opinions and beliefs upon the free circulation of which depends the security of the nation (App. Br. 101-107).

Onto this scene came our good friend Dr. Nicolas Venette, a solid citizen of the town of La Rochelle and Regius Professor of Anatomy and Surgery, and Dean of the Royal College of Physicians at Rochelle. Venette was not only an indefatigable reader and an ardent observer; but what is equally important he was a keen and penetrating thinker and subjected everything he read to shrewd interpretations and everything he saw to careful analysis, and constantly checked the one against the other. He respected the old authorities, but he did not worship them blindly, and never hesitated to match his own experience or experimentations against the findings when it seemed justified. His book abounds in the phrase, "My experience has shown me—," and often when he quotes some hallowed old authority or venerable Church Father he succinctly appends, "But this runs contrary to everyday experience." Venette stands out as one of the early practitioners of the objective scientific method.

But in addition Venette was courageous. Impatient with unfounded dogma of all sorts, his work soon led him to see how much greater amount of it there was in sexual subjects and how much harm it was doing not only to the health and happiness of the generality of the people, but also frequently it worked against the best interests of propagation, which was universally desired, by Church and State as well as the people. If we but reflect what a dubious business it is to this very day in our "enlightened" era if we undertake to write an educational book on sex, if we consider how much arbitrary power the Church can still bring to bear to suppress that book and jail its writer or publisher, we cannot but gape in amazed admiration of the temerity and purposefulness of Venette when he in his day determined to write his

By all existing constitutional tests, this statute cannot be upheld.

In this connection, appellee urges that the standard here is workable, "strictly limited to works of pornography and in no way applicable to works of any literary value" (A. B. 37). It would unduly lengthen this brief to furnish all the examples which prove appellee to be in plain error. See Haight, *Banned Books* (1955); and see, Appellant's Jurisdictional Statement, 16-21. We may, however, limit ourselves to some of appellee's citations to demonstrate the weakness of its argument, this without regard to the question whether a conceded censorship statute may stand because at any particular time the Censor fortuitously turns out to be "pretty broadminded." (*Cf., Thornhill v. Alabama*, 310 U. S. 88, 97-98.)

Take, for example, Erskine Caldwell's *God's Little Acre* which appellee notes was held not obscene in New York (A. B. 38, n. 18). In the very same note, appellee observes that under "the old 'deprave and corrupt' test of the *Hicklin* rule" (the same test as we have in these proceedings), *God's Little Acre* was held "obscene" in Massachusetts, 326 Mass. 281, 93 N. E. 2d 819 (1950). The book is a portrayal of the life of a poor white farmer and his family on a farm in Georgia. As a sociological document and as a sincere and serious work, the book has received widespread acclaim. See Judge Bok's comments on the same work in *Commonwealth v. Gordon*, 66 D. & C. 101, 107 (Pa., 1949).

In appellee's note, there is reference to Lillian Smith's *Strange Fruit*, held obscene under the same "workable" test. (318 Mass. 543, 62 N. E. 2d 840 (1945).) A recital of the character of the work, a study of race relations

and problems in the South, is contained in the court's opinion, *supra* at 846-847. The court agreed that the book was a "serious work" and assumed that its theme was "legitimate," that it was a work "of literary merit" and that it had been "favorably received by reviewers generally and widely sold to the public." *Supra*, at 847. But the book was condemned because it "had a strong tendency to maintain a salacious interest in the reader's mind and to whet his appetite for the next major episode." (*supra* at 847.)

Take the decision in *Hallmark Productions v. Mosley*, 190 F. 2d 904 (C. A. 8, 1951) (A. B. 45), where a serious lecture illustrated by a motion picture and booklets dealing with problems of sex hygiene, venereal diseases, sex relations, etc. came within the condemnation of the "obscenity" statute.

The early case of *United States v. Harmon*, 45 Fed. 414 (D. C. Kans., 1891), is another instance of a decision heavily relied upon by appellee (A. B. 27, 32), where the so-called "workable" rule was applied to a newspaper publisher who devoted columns in his newspaper to the "discussion of sexual relation, and a portrayal of its excesses and abuses." Particularly condemned was an article by a physician discussing instances falling within his professional experience dealing with abuses in coercive cohabitation between husband and wife. (*Supra* at 414.)

Unless a line is to be drawn between books that omit all references to sex and sex relations, and books that mention such matters, whether the discussion be realistic, scientific or otherwise objective, we are unable to understand appellee's contention that the standard here has been applied only to "pornography" and never to works "of

any literary value." We believe that the opposite is the case. Moreover, that the Censor, happily, was frustrated in some cases does not mean that the existing vague standard will not be misapplied as new or old situations arise, and the pervasive effect of such standard upon the thinking and writing of society in general cannot be overlooked. Very few persons enjoy being charged with "obscenity" even if they are eventually vindicated; it becomes better to avoid all "controversial" subjects respecting sex then endure such prosecutions. The greatest vice of censorship statutes is the self-censorship they engender in every thinking person.

II.

The Statute Deprives Appellant of His Liberty Without Procedural Due Process.

We have developed this argument fully in our opening brief (App. Br. 49-73), and appellee has made no real attempt to meet the issues there presented (A. B. 28-49).

The principal difficulty with appellee's position is that it is unwilling to discuss the statute here, as construed by the courts below. The question here is whether an accused can determine when a book will substantially tend to corrupt and deprave a reader by "inciting lascivious thoughts and lustful desire."

Appellee initially sets off to establish that the words "obscene," "indecent," "lewd," "salacious" and "terms of similar import" (A. B. 28) have some meaning. It asserts that "many cases" supply a sufficiently "clear and definite interpretation" (A. B. 29), when the courts almost unanimously themselves state that they are unable to define the terms. Then, immediately, appellee adds that the "definition of such terms, in their nature, change and

vary, dependent on the mores, ideals and customs of society at any given time" (A. B. 29). It depends states appellee, on the "community's current concept" (A. B. 29), without indicating what this "concept" is in the area of sex thoughts and desires. Appellee states candidly that scientists are far from agreed that books even arouse "lascivious thoughts" or "lustful desire" or cause sexual misbehavior, whatever such misbehavior may mean in appellee's view. Nor can appellee deny that no one, including a scientist, can ever identify what book at what time will incite "bad sex ideas." Indeed, appellee asks this court not to take "judicial notice" of scientific conclusions because no unanimity has been reached in the field.

Appellee asserts that "obscene" books are also "immoral" and "indecent" (A. B. 11); that "morals are not static . . . . but are like the vagrant breezes to which the mariner must ever trim his sails . . ." (A. B. 14). It concedes frankly that a "large segment of the population is not stimulated" "erotically by obscenity" (A. B. 22). The appellee points to an Illinois decision which reads as follows: "To the one who is about to engage in the sale of such pictures, the statute is clear as to what is prohibited. *His only problem is as to whether the pictures are obscene and indecent*" (A. B. 31; emphasis added). Frankly, affirms appellee, "the concept of obscenity remains elusive" (A. B. 44). The short of the matter is that appellee does not know any more than any accused as to what book will arouse a "lascivious thought," or when. The statute must, therefore, encompass virtually all books, and, according to appellee, the accused must wait for the jury to decide retroactively whether the books may see the light of day or not. It is at such time that the accused learns whether he has committed an act which

stamps him as a "sordid" purveyor of "salacity" imbued with an "avaricious desire to continue the flow of profits from the pennies of perverts" (A. B. 59), and relegates him to jail as a common felon. It is difficult to comprehend how all of this complies with the dictates of the Fourteenth Amendment.

Appellee posits another theory. It is asserted that there is a "black zone," "gray zone" and "white zone" of obscenity (A. B. 42-44). Literature which portrays "unnatural" sex acts is deemed by appellee in the "black zone" (A. B. 43), although it frankly concedes elsewhere in its brief that such literature does not generally arouse persons "erotically." We leave to one side the free speech aspects of appellee's position. In the "white zone" appellee asserts are "illustrations of women and men embracing or kissing" (A. B. 43), an enlightened view which unfortunately is not always accepted by courts and juries as appellee's own precedents indicate.* As to the "gray zone" here, asserts appellee, "an individual knows he must tread lightly," and whether the accused has "tread lightly" enough must necessarily be determined by the "triers of fact in the courts" (A. B. 43-44). Whatever may be the validity of appellee's "zone" theory in the area of perceived conduct or objective conditions, it is submitted that the theory cannot be employed in the area of the inner mind of man. Whether a book will arouse a particular thought or desire in the mind of a reader to the extent of substantially corrupting and depraving him is not a zoning problem; it is a problem which is inherently insoluble.

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*See also the trial court's view here that one of the books was "obscene" because it contained "references to sex", such as, "lingering kiss on her lips" [R. 89].

The appellee attributes to appellant the argument that it is "impossible" to frame a statute in the "obscenity" field (A. B. 46-48). That is appellee's version; not appellant's. We did assert candidly our belief that any statute limited only to books which arouse "lascivious thoughts" or "lustful desire" cannot be constitutionally drawn. On the other hand, appellant asserted that statutes narrowly drawn as to conduct or incitement, or particularly if narrowly drawn with respect to children would raise different problems. We asserted also that Judges Frank and Bok had suggested statutes narrowly drawn to reach conduct or its direct coercion or incitation which a State might have a right to prevent (App. Br. 43-44). Appellee here has made no attempt to demonstrate why it is not possible to draw a statute narrowly to meet constitutionally, the "evil" it seeks to prevent. It is appellee who is arguing that it is "impossible" to draw any statute in the "obscenity" field without establishing the broadest and vaguest standard to encompass all art and literature; without vesting censorial powers in agencies of government.

III.

The Case Here Illustrates Graphically the Vice of This Censorial Statute.

A discussion of the particular application of the statute requires first that the posture of the case be correctly presented, and second, that the exhibits involved in the case be dispassionately examined.

Initially, it is fruitless for the appellee to attempt to avoid the decision in *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, 178 P. 2d 853 (A. B. 56, n. 33). The decision was relied on by the court below [R. 20], was written by the same court, and, indeed, is the authorita-

tive decision in the "obscenity field." The issue of the construction of the provisions of the "obscenity" statute was directly involved in *Wepplo*, and a new trial was granted in the case only because of an error in the rejection of evidence. The construction of the law was not "dictum," but precisely declared "law."* The *Wepplo* construction of the statute was also relied on by the trial court here [R. 83-88]. Thus, both the trial and appellate courts followed the same construction of the statute under which appellant was convicted. Any attempt now to justify the judgment here under some differently improvised statute would mean conviction under a charge not made and a sheer denial of due process. (*De Jonge v. Oregon*, 299 U. S. 353, 362; *Cole v. Arkansas*, 333 U. S. 196.) In fact, appellee is relying on the "lascivious thought" and "lustful desire" construction of the statute; it simply has sought to extend the statute to include the standard of "bad taste" as well, because in appellee's view that is the only way it can make the statute "workable."

Secondly, we desire to demonstrate how this case was ultimately limited to a consideration of the books alone by the appellate court. The prosecution was initiated by a raid on appellant's business premises which resulted in the seizure of hundreds or thousands of books, magazines, brochures, pictures, letters, labels and other related material [R. 14-18]. From all of this welter of material, the prosecutor selected that which he considered violative of the statute, lumped the material together in various

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*The Appellate Department does not render too many written opinions because of the great number of cases which come before it. When it does write an opinion, as in *Wepplo*, it does so because it recognizes a duty "to declare the law" for the guidance of more than eighty municipal court judges. [R. 22-23.]

exhibits, and introduced them into evidence [R. 26, 27, 28, 29, 32, 36, 37, 38, 39, 40, 49, 52, 53, 55, 64]. The trial court then ruled on the evidence [R. 80-94], found some of the books and pictures to be "obscene" and others not. It also found that many of the exhibits had not been "kept for sale," a requirement of the statute, and dismissed them from consideration [R. 90, 92].

On appeal those books which the trial court found not to be obscene,* the appellee argued were obscene. As to the books which the trial court held obscene, the appellant argued to the contrary and urged also that the proof did not establish that the books were "kept for sale" [R. 15]: As to the pictures which the prosecutor believed to be "very obscene," these the trial court had excluded from the case as not "kept for sale" [R. 14, 92]. The remaining pictures on appeal the prosecutor described as only "moderately obscene" [R. 13-14], thus impliedly conceding that views might differ as to whether they were or not. Appellant on the other hand urged, in addition to all other arguments, that the statute and charge covered only "preparation" of pictures [R. 1], and concededly appellant had not been shown to have so prepared or otherwise drawn the pictures. Appellee argued for a broader construction of the law.

Pressed between these arguments the court below limited its opinion "simply" to "obscene books" [R. 19-21]. As we indicated in the Statement of the Case (App. Br.

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*[People's Ex. 5; R. 25-26, 64, 86-88.] Appellee now argues that the trial court so held at "12:00 o'clock noon", but may have changed his mind when the guilty verdict was rendered at "3:55 p.m. of the same date" (A. B. 53). This bit of mind reading is not a legally supportable position, and, in fact, at "3:55 p.m.", the trial court stated that he had not "altered" the position "expressed when the People rested" [R. 117].

12), the court failed to indicate which books were the basis of the conviction merely stating that some of the books were undoubtedly obscene [R. 21; App. Br. 71, n. 24].

Thirdly, as to the books themselves: On appeal, the court below requested the appellee to present a written evaluation of all its evidence, indicating that which it considered obscene and that which it considered not obscene. An "Analysis of Exhibits" was presented [R. 12-14]. At least twenty-three different books, magazines and pictures were now conceded by the appellee to be not obscene [see, "Answer to Analysis," R. 14-18]. Others were held to be moderately "obscene"; some "very obscene" [R. 12-14].

The matter comes down to about six books which appellee maintains are "very obscene." Space does not permit extended comment upon these books, but appellant submits that a reading of each of these writings will indictate (1) that it is simply irrational to urge that anyone should know these books arouse "lascivious thoughts" in a reader to the extent of corrupting and depraving him; (2) that these books are scientific and literary material protected fully from suppression by the fundamental law; (3) that the ideas contained in these works are important and should be known and considered by those who wish to know and consider them; and (4) that by designating these works as "pornography" and "hard core obscenity," the appellee has made crystal clear the vagueness and limitless scope of the statute here involved.

Of the books designated as "very obscene" by appellee, one of them is "The Picture of Conjugal Love" [Ex. 5; R. 27-28, 64], published by the Haldeman-Julius Publications in 1948. The book is a translation of a work writ-

APPENDIX.

(From Exhibit 5 [R. 27-28, 64], Which Appellee Designates as "Very Obscene" [R. 13]).

The Picture of Conjugal Love

Being a Translation of the Tableau de l'Amour Conjugal, ou la Generation de l'Homme.

By Dr. Nicolas Venette.

Translated and Edited by A. F. Niemoeller.

Translator's Foreword

To attempt at this late date to laud the courage and acumen of old Nicolas Venette or to estimate the importance of his *Tableau de l'Amour Conjugal* in the history of sexual science and its slow and laborious development of a sound literature, would not only be a waste of time but highly presumptuous as well.

In the 17th century, when Venette lived, the spark of objective science burned but feebly and many adverse winds blew strongly to extinguish it with but few favorable breezes to fan and encourage it. It was an age of rampant superstition with the folk and religious beliefs of pagan times that had been preserved and altered during the Dark Ages being heavily dogmatized by Church, law, and science. The price of disbelief or even of question was often still torture or perhaps death, and in most instances legal penalty and social ostricism. License and libertinism were common but, as is always the case with narrow and self-indulgent persons, they were overlaid with a thin but hard veneer of formalized morality which forced decency to undergo its customary migration under

Tableau de l'Amour Conjugal, and not only did he most successfully carry it through against all the opposing forces of his time, but he produced a work which for his period was a masterpiece of scientific method, and laid a highly important foundation stone in the literature of possibly the most fundamental study of humankind: sexology. We salute Nicolas Venette as the scientist, the sexologist, and the man.

Of his book, hereafter translated, little need be said here as it may be read and judged on its own merits; a test it has most successfully been meeting for some 250 years. It appeared in its first form in 1688 as *Tableau de l'amour considere dans l'estat du mariage,* published "A Parme. Chez Franc d'Amour." In subsequent revised editions its title became changed to *De la Generation de l'homme, ou Tableau de l'amour conjugal,* and later to *Tableau de l'amour conjugal, ou Generation de l'homme,* but it is by the first portion of this last title that this famous work is most commonly known. It would probably be impossible to discover exactly how many editions this book has gone through. First published in 1688, by 1712 it was already in its 9th edition. There was a further edition put out in Amsterdam in 1745, another in 1778, and an edition was put out in Paris at least as recently as 1924.

It is to be marveled at that so important and famous a book that has had such tremendous circulation in its own language, has had no adequate and readily accessible English version. True, in the early 18th century a couple of translations of it were brought out in England, but these were stilted, flamboyant, and incomplete, which did Venette but poor justice and are today practically un-

obtainable, the few extant copies being exorbitantly priced collectors' items.

This deplorable lack we have attempted to remedy in our present translation. The rendering is completely literal, without gloss or excision. We have purposely retained as much as could be brought into English of the quaint archaic phrasing and typically Galic circumlocution, feeling that a rendering into present colloquial English might not be nearly so congenial to the spirit of this work. We have appended a few notes to explain obscure technical points that might trouble the average reader, but we have presumed no comment where Venette's own logic and reason will serve the diligent.

A word as to Venette the man, and we have done. He was born at La Rochelle in 1633, and died there in 1698. He was a Frenchman, a doctor of medicine, and a member of the college of physicians of his town. Of his personal life we know not a great deal more. Besides the present volume, he left works on scurvy, the mineral waters of La Rouillasse, urinary calculi, the pruning of trees, the nightingale, and a translation of Petronius—none of which, however, achieved anything remotely resembling the fame and wide currency of this, his outstanding production.

A. F. NIEMOELLER

St. Louis, Mo.
September, 1947.

Preface

Were not the books of the ancients which treat of love unfortunately lost, either through the malice of men or the injury of time, we without a doubt should have through their reading augmented our observations on the generation of man and through this we should have put an end to the just complaints of the illustrious Tiraquel.

But although we are lacking these, we have, it seems to me, through our own experience and that of our friends enough information to make a large volume on the orders which nature has prescribed to us for the production of man, without our having recourse for this to the thoughts of the ancients.

Nature, which is only God himself, or more properly His divine providence spread through the universe, will furnish us with ample information on this matter without searching elsewhere. Consequently, we shall follow her precepts and we shall obey her decrees; but, as truth is an attribute which is inseparable from her, we shall here disguise nothing in order that Nature and Truth, joined together, may be the two guides to conduct us throughout the whole of this work.

We shall therefore discover the secrets of Nature, and we shall make known to the eyes of all everything most truthful and most hidden that there is in the story of the generation of man.

I well know that everyone has not the strength of soul to consider such a thing and admirable work; that amongst men there are a great many weaklings and over-scrupulous who make scandal of all that is not according to their taste and who are forever complaining when everyone is not of their sentiments. The naked truth has no charm

for them; it horrifies them if it is not disguised. They would that it be masked so as to be beautiful; and, as if they were not even men, at the least allurement of love they are taken aback, are offended, cry out, take alarm, and flee.

The first men were quite otherwise than we: they were much stricter and much more reasonable than we are. Their nudity caused them no disordered emotion. Nature and reason were the mistresses of their amorous impulses and love itself, imperious as it may be, seemed to obey their orders when they set themselves against it in any degree. They regarded a woman as a statue when it was not permitted to love her, but if by chance love warmed their heart then their reason and strength of soul managed their passions so expertly that they were able adroitly to make certain of its charms. Nudity of a man or a woman made no more impression on their soul than formerly did the girls of Lacedaemon make on the mind of the people when they danced stark naked in a cross-roads without being covered by anything more than the public virtue.

But this strength of soul is today banished from our provinces, and it seems that it is preserved only among the savages who, in this respect, are much less savage than we.

When I consider the blindness of man and the contraries which bring on his misery, I go into a rage to see him in that state. From this I am amazed that despair does not prompt him to become informed about himself and to know from whence he comes and how he is made. I ask him if he is better instructed than I on the parts which compose him and on the material from which he has been engendered: and from his conversation I know

that on this we are, the one as much as the other, extremely ignorant. We both look about us and we see people who in this respect have no more information than we. By chance we find a man who instructs us in the principles of generation, who shows us the parts, clarifies for us the actions, and makes us understand the order that God has given men for multiplying their species in marriage, and the misfortunes which occur from the taking of excessive pleasures in them. Does this ma.. with whom I converse feel resentment for knowing himself and his origin, does he insult the person whom he instructs in the admirable design of Nature for the generation of man? As for me, I see that they are the commandments and orders of God, and I admire them and submit to them.

I confess that we have been brought up to feel repugnance in naming the natural parts of either sex, which we have called *shameful* although Moses denominated them *holy,* since it was not permitted a woman to touch them without having her hand cut off; and we are accustomed to feeling horror for their actions, as if God, according to the thinking of St. Thomas of Alexandria, had not made them and as if divine and human laws did not permit us to use them.

We know that one may speak of the most shameful and abominable things without injury to propriety, so long as one speaks in a way to gloss over the condition in which persons are when they are committing them, or through his decorum shows that he envisages them with pain and that he communicates them to others with all the niceties of discretion. Presenting the most infamous things under this veil of horror makes them be regarded as crimes, if they signify the thing rather than the action itself, because each thought expressed having two sorts of signifi-

cation, one of its own and the other accessory, it is considered in different senses. Thus a thing may be infamous or honest, forbidden or permitted. These accessory ideas are not always attached to words by common usage; they must be referred to those to which they are useful, and a book should be read under this condition. For words being only sounds and things being in themselves indifferent, neither the one or the other is shameful; and it is an affliction and weakness of soul to be scandalized by them. It is thus that St. Augustine employed them when he said that, if there was some lewd person who read what he had written on the pleasures of love in marriage, it would condemn his own turpitude rather than the words of which he had been obliged to make use to explain his thoughts on the generation of man; and he adds that he hopes that the chaste reader and sage listener will readily pardon him the manner of speaking of which he has made use to explain himself on this matter. It is also in this manner that the Apostle used them when he spoke of the horrible crimes of the men and women who had altered the natural use of their parts to that which is contrary to the laws of Nature.

He who knows what the world is regards everything with indifference; and, in imitation of the sun, he can be stained by nothing, however dirty it may be. If by chance this book falls into his hands he will read it without scruple and he will admire secret laws that God has given Nature for the perpetuation of the species of man.

But because it is through love that we are engendered and because love, which the Scriptures name *charity*, according to the opinion of St. Jerome, is the strongest of all the passions, in it will be found something to handle

cautiously and to tame, even when it shall be constrained: so much so that I doubt that this book may be able to be of great help to some persons, even to those of outstanding virtue.

A young man, then, will understand from it of what temperament he is, what disposition he has toward continence or marriage; he will learn at what age he ought to marry in order not to weaken himself in his early life and to live long and with pleasure; in what season and at what hour of the day he can make, without inconvenience, healthy and intelligent children who will one day be the honor and glory of their father and the support of the State. But because young men think only of sensual pleasure when they marry, they shall here see depicted the incurable distresses brought on by the excessive pleasures of marriage, so that before having proved the misfortunes that they cause us, they may avoid them and at the same time preserve themselves against them.

An old man will here find the age to which he may marry and, if he has plans for procuring heirs through he marriage, he will here see how he ought to comport himself with a wife in order to have children, and also how in the coldness of his age he ought to arouse himself with her without running any risk of affecting his health or committing any fault against the maxims of religion.

The theologian, the casuist, and the confessor will here learn the true causes of the validity and the dissolution of marriage, the vices that are there to be met with, and even the sins that may there be committed amongst the permitted sensual pleasures. For herein we examine with a great deal of care all that which is opposed to generation and consequently all that which is contrary to

the decrees of God, to the laws of marriage, and to the intention of the Church.

A judge will here find some difficulties of law and medicine, which the jurisconsults have never sufficiently cleared up, established and decided so plainly that hereafter he will himself know how to distinguish the true causes of impotence in a man and sterility in a woman and will not allow himself to be deceived when there shall be presented before him supposititious children. This science in itself is not above suspicion since a doctor, surgeon, or midwife, to whom ordinarily recourse is had in such matters, may be won over either through complaisance or interest. Here also will be noted the faults which may cause divorce between married persons, the age at which one begins to engender, that at which one finishes, and the signs which can truly indicate pregnancy. Here will be seen if Nature has fixed for women a time for childbirth; if charms, magicians, or demons are able to hinder married persons in consummating marriage. Finally, here will be learned if hermaphrodites and eunuchs ought to get married and if they are able to beget children.

The philosopher and the doctor will here find, it seems to me, something to satisfy them in reading of some discoveries I have made on the natural parts of woman and the new conjectures I advance on the place of the conception of men and on the causes of menstruation and of milk in women, and in a quantity of other matters that have not been at all well explained before this.

A wife will learn from this book how to govern her amorous activities and to take care of the reputation of her daughters. Here she will see which temperament is best suited for the cloister or for marriage in order to commend the one or the other state to her children, who

afterward will not despair through having embraced a state for which they were not fitted. Here she will gain the knowledge of how she ought to do her duty toward her husband and the consideration she should have for him when she loves his health and is not slave to her passion.

A girl will be instructed in advance on all the disorders that love can cause, without first testing them out herself; for, as the bonds of marriage are indissoluble, it will be desirable that all girls know, before being married, the pains and vexations that are to be endured in it.

Even an atheist, who will read this book attentively and who without prejudice will observe all the measures taken by Nature in the actions and formation of man, will herein find that to change his viewpoint. And I feel assured that there is no book nor reasoning that will bring him to know God more clearly than what I have written on the generation of man.

A debauchee will here come to know what vexatious afflictions and incurable maladies a disordered love causes; and after having made some serious reflections on this he will here find remedies, either for opposing the violence of love, for considering his health, or for being more restrained in the future.

It is to be hoped that the reader, of whichever sex he may be, may have an ordered mind and know what love and the world are; in addition, that he may be neither libertine nor lewd. I shall even desire that he be of a reasonable age in order to be of a condition to profit from the book.

We can, then, regard the portrait of love, which I have done after nature, for the purpose of avoiding those of its

faults and crimes which I have there pointed out. I have intended to reform the morals of the libertines and to show to the wise the versatility of love for distraction, and most of all how to preserve their health and to constrain them to choose the most assured course for generation without abuse.

Now, should we admit the complaints that are made us, we would have ground to accuse the One who has formed the natural parts of both sexes, and it likewise would be possible to blame Him who has presented us with the vine since we so easily get intoxicated from its juice. For if we weigh the benefits and gifts of Nature by evil uses of those who employ them, in truth we shall forever be taking them in bad part.

We shall then be reduced in this extremity to suppressing the major portion of old and new books. We shall banish from our libraries Catullus, Juvenal, Horace, and even Virgil, all who so agreeably converse with us on love.

And Father Sanchez, the Jesuit, would not be exempt from blame, he who has done a large volume on the most secret of things that transpire between married persons. One would no longer read St. Augustine, St. Gregory of Nice, nor Tertullian, who speak of conjugal love in terms that I would not dare to translate into French without paraphrasing them.

Further, touching upon medicine and anatomy, I should place above all things the book on *Popular Errors*, by Joubert, which treats of the actions of the parts of the sexes and which he readily dared dedicate to Marguerite of Navarre, grandmother of Henry the Great, of glorious memory; that of Ambroise Pare and du Laurens who treat of the generation of man, and that of M. Mauriceau

who speaks of women in childbirth, along with pictures which seem indecent and lewd. So long as there will openly be sold a book which treats of the passions of the soul, which adroitly insinuates into our hearts the most tender emotions of love; or the books of Bodin, the advocate, and of Delande, adviser to the Parlement of Bordeaux, which make plain to us the lewdnesses and abominations committed by the sorcerers at the *Sabbat;* or the romance of the *Rose*[1] and of the *Bourdon,* of which Jean de Meun was the author, which will still be found in our libraries; or the pieces of verse, the satires and comedies of our poets on public sale; or for that matter the sanest of all the books that may be found in the hands of almost all the women, I cannot believe that it might be found evil that I have discussed in my own language all the questions which compose this book.

I know that there are some persons so susceptible to love that they cannot behold any amorous object nor read any book that treats of it without being moved even to the extent of crime by this passion. These persons I counsel to flee the conversation of men or live in the desert and solitude in order to see nothing which shocks them or hear anything that may be said regarding the generation of man.

Now if, through effort or skill, we might be able to abstain from activities of love or to keep others from them, I confess that I should do wrong to expose this book to the eyes of everyone. But since love is a passion which strongly affects us, often without being able to defend ourselves against it, it seems to me that one ought rather to praise than blame a book which teaches modera-

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[1]Le Roman de la Rose.

tion and the preservation of health by guaranteeing oneself against the versatility which it always employs to mistreat us; for it is part of human prudence, which the Fathers of the Church have termed *prudentia carnis,* to preserve the health through moderation in the pleasures of marriage.

It is not always books that teach us what we ought not to know; a bad disposition and unchaste examples and conversation will often work as much evil.

I have no doubt, moreover, that if this book should be judged only by the title of its chapters it might appear impertinent and lewd to some persons who have been badly reared, who have bad inclinations and a mind turned toward evil. But if it is opened to be read and if the plan that I have had in composing it is judged without prejudice, through it one will doubtless worship the divine Wisdom which has had our hearts taken over by the means of love for the perpetuation of our species.

But everyone is not capable of judging my book well. It is like a picture which all sorts of persons are not capable of understanding. In order to judge it well, one must be acquainted with the science of painting, and then put himself at the proper point for viewing; for there is but a single and unalterable position from where it may be seen well. Those who judge it often do not put themselves there. They place themselves too near, too far, too high, too low, and thus they judge of it badly. Furthermore, ignorant persons are not at all capable of judging of it, nor are those who have looked at it in the light of hearsay or prejudice. There are, therefore, three sorts of people who will set up to be its judge. The first, entirely ignorant, will say, along with the rest, that it is worthy only of being burned at the

hands of the executioner. The second, the savants, will judge it well, or will say not a word about it, and will admire in it the order of Nature and the precepts of God for the generation of man. Finally, the third, the half-savants, who are of much greater number than the other two, will give it out that my book is pernicious. They will put on knowing looks, upset everyone, and judge far worse than the others. They are jaundiced, and will say that it is I that is smeared with yellow. In truth, everyone has not the right to judge. For this it is necessary to have a straight mind, good taste, and good sense, and few persons have this: this is testified to by what Quintillian has pointed out to us about men of his own time who esteemed Lucretius above Virgil, although the first when compared to the other does not even merit the name of poet. Finally, in defense of my book I should wish no more than the apology made for that of the Jesuit Father Sanchez, who has written of marriage as I have: and then it will have been well defended.

What preacher of the Church has exhorted with more moral zeal and force than I for the moderation of the pleasures and the avoidance of the voluptuousnesses of marriage? Who has been more opposed than I to excesses in love, and who has taught surer means for protecting himself from its allurements? One has only to read art. 2 of chap. 3 of part one; chaps. 1, 2, and 6, arts. 1 and 2 of chap. 8 of part two; and chap. 1 of part three of this book, and at a number of other places, to find out if I urge men toward vice rather than toward virtue.

How badly one judges when he judges things only by the outside or by appearance! If we consider how Lot amorously caressed his daughters; how Samson performed miracles, which St. Jerome literally termed fables;

how David committed adultery; how Tamar prostituted herself; how Hosea got married unchastely through the counsel of God; how *Holla* and his sister ran after lewd persons, should we not believe that these are indecent, abominable things and unworthy of being placed in Holy Scripture?

In addition I beg that my book he not judged without having read it, as formerly was done with the books of St. Thomas and of Francis Bacon, chancellor of England, who reckoned to be magicians solely on the title of their books, and finally that one does not stupidly permit himself to be led either by the persuasions of my enemies or the malignity of ignorant people: for there are in the world a great many more idiots who halt before grotesque paintings than there are wise men who apply themselves to contemplating the beauty of Nature. After all, if they find it bad, I consent to their bla.. g it and even to their having it burned, as did the emperor Nero with the satires of Fabricius Veiento, and the Roman orator with the books of Cremurius Cordus.

But why should I be astonished if my book is so maliciously criticized? Have not the most perfect works been criticized? Against these same works there have been the most intense envy and hatred. Has it not been said that Homer often slept and that he was full of faults; that Demosthenes scarcely satisfied those who read him; that Cicero was a compiler from the Greeks, and they have even indicated all the passages, and that he was timorous, slack, dull, too copious, and too sluggish in his exordia, too tiresome in the cadence of his periods, and finally too slow in arousing himself; that Seneca the elder had no unity and that his discourse was but as sand without lime; that Pliny the historian swallowed all his

opinions and digested nothing; that Virgil had little mind and was a usurper of the thoughts of others; that Ovid was too wordy; that Horace was too indecent and that he had written verse in prose; that St. Ambrose was the crow of the fable, and that his *Commentaries* of St. Luke were but idle stories and trifles? Finally, envy is not content simply to attack the reputation of persons it hates, but also of those who are contrary to it.

Be that as it may, in fashioning this book I had quite resolved to have as many judges as readers. To me this appears neither onerous nor unjust.

Finally, I have not been able to do otherwise, regardless of such discretion as I may have been able to bring into my discourse. I shall be highly satisfied if a smaller number of learned and well informed persons esteem my book. I should always prefer them to a coarse multitude which often is a poor interpreter of truth. This doubtless is what the wise man wished to say when he left us through writings that *the opinion of the people is often the opinion of fools*, and what is to be implied to us by Horace, who begins one of his most beautiful odes with these words: *Odi profanum vulgus et arceo.*

If, dear reader, you should dare
To criticize my phrasing blunt,
Please make haste to show me where
You could be more elegant.
Regard who will with sober air these words so innocent
No crime is it to make attempt to paint
Those tender thoughts Nature would to us acquaint:
Each finds in him these same emotions needing vent,
And who would stifle them has lost good sense.

—Petronius

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IN THE

Supreme Court of the United States

October Term, 1955

No. 260

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Appellee.

Appellee's Statement Opposing Jurisdiction, and Motion to Dismiss or Affirm.

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The California Penal Code section here in question, does not, on its face and as construed and applied to appellant in the instant case violate freedom of speech and press, nor does said Code section or the decision of the California court, conflict with any federal law or decision, nor does the Code section and its application deny appellant substantive and procedural due process of law 3

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IN THE

Supreme Court of the United States

October Term, 1955

No. 852

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Appellee.

Appellee's Statement Opposing Jurisdiction, and Motion to Dismiss or Affirm.

Comes now the People of the State of California, appellee, and moves to dismiss or affirm the above appeal and respectfully presents the following matters in support of the motion, and opposing jurisdiction of this Honorable Court, asserted by appellant, upon the following grounds:

1. That the appeal herein does not present a substantial federal question and the judgments rest on an adequate non-federal basis.

2. That it is manifest from the record that the questions on which the cause depends are so unsubstantial as not to need further argument. (U. S. C. A., Title 28, Rule 16 (1955 Pocket Supp.))

Statement of Case.

A complaint was filed in the trial court charging the appellant in Count I with violating Subdivision 3 of Section 311 of the California Penal Code, *i. e.*, selling or keeping for sale obscene and indecent books. In Count II appellant was charged with violating Subdivision 4 of the same code section, *i. e.*, advertising such books. He was tried, found guilty and placed on probation. He appealed and the California Appellate Court affirmed his convictions. [Jur. Stat. pp. 1-2, and Ex. A.]

Statute Involved.

The California Penal Code, Section 311, Subdivisions 3 and 4 provides:

"Every person who wilfully and lewdly, either:

. . .

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . . is guilty of a misdemeanor." [Jur. Stat. pp. 3-4.]

Constitutional Questions Presented.

The appellant states:

"This appeal presents the following questions under the Constitution of the United States:

"(1) Whether the statute in the instant case, Penal Code, Section 311, Subdivisions 3 and 4, upon its face

and as construed and applied, and the prosecution thereunder at bar, violates procedural and substantive due process of law and denies and/or abridges freedom of speech, press and thought, in contravention of the due process clause of the Fourteenth Amendment and the freedom of speech and press clauses of the First Amendment of the United States Constitution.

"(2) Whether the statute in the instant case, Penal Code, Section 311, Subdivisions 3 and 4, as applied here to the mailing of circulars and the keeping of books for sale by mail is repugnant to Article I, Section 8, Clause 7 of the United States Constitution and unlawfully infringes on a sphere of activity reserved exclusively to the federal government respecting which the federal government has fully legislated, preempting the field." [Jur. Stat. pp. 4-5.]

I.

Appellee's Answer to Appellant's Contention.

The California Penal Code Section Here in Question, Does Not, on Its Face and as Construed and Applied to Appellant in the Instant Case Violate Freedom of Speech and Press, nor Does Said Code Section or the Decision of the California Court, Conflict With Any Federal Law or Decision, nor Does the Code Section and Its Application Deny Appellant Substantive and Procedural Due Process of Law. [Jur. Stat. p. 9.]

It appears that appellant's first attack on the code section is that:

"THE STATUTORY STANDARD—PROSCRIBING 'OBSCENE AND INDECENT' LITERATURE— . . . . IS UNCONSTITUTIONALLY VAGUE AND UNCONFINED, AND A CENSORIAL PROSCRIPTION OF IDEAS AND SPEECH . . ." [Jur. Stat. p. 9.]

The terms used in Section 311 of the California Penal Code, under which the appellant was convicted, are similar to those used in Federal statutes prohibiting the mailing, selling, importing, transportation, or broadcasting of any matter that is obscene, lewd, lascivious, filthy, profane or of an indecent character. (18 U. S. C. A., Secs. 1461-1464.) This court has upheld the validity of these Federal statutes as not being unconstitutionally vague or indefinite. (*Rosen v. United States* (1896), 161 U. S. 29, 40, 165 S. Ct. 434, 40 L. Ed. 606; *United States v. Dennet* (1930), 39 F. 2d 564, 76 A. L. R. 1092; *Bonica v. Oleson* (1954), 126 Fed. Supp. 398; *United States v. Limehouse* (1932), 285 U. S. 424, 76 L. Ed. 843, and also Anno. 76 L. Ed. 845.)

It would, therefore, appear that if the standards set forth in the Federal statutes involving obscenity, are not unconstitutionally vague or indefinite, *a fortiori* a state statute which uses the same standards should also be held constitutional.

Appellant cites a series of cases starting at page 10 of his Jurisdictional Statement, twenty in number, purporting to illustrate the standard in this court as to vagueness in proscription or prohibition against expressions involving the principles of free speech, which he terms "comparable in principle and in substance to the characterization 'obscene,' or to the similar term at bar, 'indecent.'"

Of these, thirteen are licensing cases involving the principle of "prior restraint" as opposed to "subsequent punishment." As noted by this court in *Burstyn v. Wilson* (1951), *infra*, 343 U. S. 494, 96 L. Ed. 1099, which in discussing *Near v. Minnesota* (1931), 283 U. S. 697, 75 L. Ed. 1357, held that the major purpose of the First Amendment guarantee of a free press was to prevent prior restraint on publication.

Thus in the weighing of society's interest in free expression of opinion against its interest in the suppression of matters clearly within the police power, this court has found freedom of expression the more important, *so far as prior restraint is concerned.* The latter interest of society has been considered met by the answer that the publisher, who may not be previously restrained, publishes obscene matter and similar classes of material at his peril of prosecution and punishment *after the publication.*

In *Kunz v. New York,* 340 U. S. 290, 298, 95 L. Ed. 280 cited by appellant, which cites with approval and emphasizes the following quote from *Chaplinsky v. New Hampshire,* 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1035, it is stated:

> "There are certain well defined and narrowly limited classes of speech *the prevention and punishment* of which *have never been thought to raise any constitutional problem.* These include the lewd and obscene . . ." (Emphasis is that of the Supreme Court in the *Kunz* case.)

In the instant case no prior restraint is suggested. The obscene books were already published and were currently kept for sale and advertised for sale.

Of the remaining seven cases cited by appellant, one is *Winters v. New York,* which is fully discussed and distinguished *infra; Musser v. Utah,* 333 U. S. 95, 96, did not reverse the trial court, but remanded the case to the Supreme Court of the state for further clarification of the state statute, the only mention of the principle of free speech being in the dissenting opinion; *Thornhill v. Alabama,* 310 U. S. 88, 91-92, is concerned with a statute prohibiting the carrying of any sign for picketing; *Herndon v. Lowry,* 301 U. S. 242, 263-264, involved a Georgia

statute on subversive activity and in that regard too vaguely worded; *Stromberg v. California,* 283 U. S. 359, 369, involved the California "red flag" statute, and held it to be not sufficiently definite in its terms.

In other words, none of appellant's authorities are concerned with a statute dealing with subsequent punishment for publication of obscene or indecent matters (with the exception of the *Winters v. New York* case elsewhere herein distinguished), and therefore it is appellee's contention that none of the cited cases as presented in appellant's brief are decisive or controlling in the instant case.

Appellant relies upon *Holmby v. Vaughn* (1955), 350 U. S. 870 [Jur. Stat. p. 9] and states:

> "Although Holmby was without written opinion it is evident from the citation of the Burstyn and Superior Films cases its holding is that 'obscene' is an unconstitutionally vague standard violating freedom of speech." [Jur. Stat. p. 10.]

The *Burstyn* case (*Joseph Burstyn, Inc. v. Wilson* (1952), 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098), involved the licensing of motion pictures "prior to their being shown." In that case this court stated:

> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the contents of the words and pictures sought to be communicated. This court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v.*

Minnesota, 283 U. S. 697, 75 L. Ed. 1357 (1931). The court there recounted the history, which indicates that a major purpose of the First Amendment guarantee of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited.'"

The case of *Superior Films v. Department of Education*, 346 U. S. 585, 98 L. Ed. 329, also cited by the appellant, is to the same effect. None of these cases are applicable to the instant case. In this case there was no prior restraint but a conviction within the permissible scope of subsequent punishment.

The appellant futher relies upon the case of *Winters v New York* (1948), 333 U. S. 507, 92 L. Ed. 840. That case involved a conviction under a statute which made it an offense to publish or distribute publications "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds or bloodshed, lust or crime" The court held that inasmuch as the term "obscenity" had never included these matters, the statute was unconstitutional as being vague, and not setting up a sufficiently definite standard of conduct. It appears that a correct interpretation of the *Winters* case is found in the case of *United States v. Hornick* (1955), 131 Fed. Supp. 603, wherein the court stated:

"In support of their (appellants') position they cite *Winters v. People of the State of New York* (1948), 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840. We have no quarrel here with that case. In fact, the meaning we get from it indicates that this motion is without merit. The Winters case classified

indefinite statutes into two categories: (1) 'permissible uncertainty'; and (2) 'unconstitutional vagueness.' Into the second category the Court placed the statute there under consideration. This forbade 'massing stories to incite crime.' *But into the first category the Court placed those statutes which dealt with 'obscene, lewd, lascivious, filthy, indecent or disgusting' words which are used in 'describing crimes' and which are 'well understood through long use in the criminal law . . .'* 333 U. S. at page 518, 68 S. Ct. at page 671. Therefore, we are constrained to hold that the statute in question, 18 U. S. C., Sec. 1461 (1952), is sufficiently definite to sustain an indictment based thereon." (Emphasis added.)

It is again submitted that in the instant case the appellants were convicted under a state statute which dealt with obscene matters, which were well understood and defined through long use in criminal law and that, therefore, the *Winters* decision would have no application herein.

In *Besig v. United States* (1953), 208 F. 2d 142, persuasive language pertinent to the question here presented is set forth. Among other things the court stated:

"The word 'obscene' is not uncommon and is used in English and American speech and writings as the word symbol for indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions or to the excrement therefrom.

. . . . . .

"Whether the moral conventions should be flaunted in the cause of frankness, art, or realism, we have no occasion to decide. That question is for the policy branches of the government. Nor do we understand that we have the legal power to hold that the statute authorizing the seizure of obscene books is inap-

plicable to books in which obscenity is an integral part of a literary work. So that obscenity, though a part of a composition of high literary merit, is not excepted from operation of the statute, whether written in the style of the realists, surrealists, or plain shock writers. The civilization of our times holds to the premise that dirt in stark nakedness is not generally and at all times acceptable. And the great mass of the people still believe there is such a thing as decency. Indecency is easily recognizable.

. . . . . .

"We agree that the book as a book must be obscene to justify its libel and destruction, but neither the number of the 'objectionable' passages nor the proportion they bear to the whole book are controlling. If an incident, integrated with the theme or story of a book, is word-painted in such lurid and smutty or pornographic language that dirt appears as the primary purpose rather than the relation of a fact or adequate description of the incident the book itself is obscene."

See:

Burke v. Kingsley Books, Inc., et al., 142 N. Y. S. 2d 735.

In *Schindler v. United States* (1953), 208 F. 2d 289 at 291, it is stated:

"It is claimed that the booklet 'Arabian Love Manual' is not obscene under modern legal definitions of obscenity. We think otherwise. In our opinion the book is lewd and filthy by whatever standards one may appraise it. For a very recent discussion of the general subject of what constitutes obscene matter, see *Besig v. United States* (9 Cir.), 208 Fed. 2d 142."

The remark in the above case would appear to be equally applicable to the evidence shown in the matter presented in the instant case.

The opinion of the California Court in the instant case [App. A, to Jur. Stat.] is not in conflict with any federal cases and has correctly stated at pages 2 and 3 that:

> "The words 'obscene or indecent' as used in Subdivision 2 of Section 311, are not unconstitutionally indefinite. As early as 1896 the United States Supreme Court knew their meaning. *Swearingen v. U. S.* (1896), 161 U. S. 446, 451, 16 S. Ct. 562, 40 L. Ed. 765, 766, and a large number of cases since then have been decided on the theory that their meaning was not obscure. See Annotation, 76 A. L. R. 1099, and *People v. Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 961. 178 P. 2d 853, 855. To be sure, it is not always easy to decide on which side of the line a book should be placed, but if a difficulty of that sort sufficed to condemn a statute, then we could not declare it to be a crime to drive while under the influence of liquor, or to induce a person to part with his property by a false pretense, or to kill with malice aforethought."

The elements of lewdness and obscenity under the accepted definitions of these terms are proper subjects of regulation and prohibition. (*People v. Babb* (1951), 103 Cal. App. 2d 326.)

2. Under Subdivision 2 of appellant's first contention, he states: "THIS CASE PRESENTS IN AN IMPORTANT RESPECT THE SAME QUESTION POSED IN BUTLER V. MICHIGAN, PROBABLE JURISDICTION NOTED THIS TERM." [Jur. Stat. p. 21.]

The basis for appellant's above contention is that the case of *People v. Wepplo* (1947), 78 Cal. App. 2d Supp.

959, so construed Section 311, Subdivision 3 of the California Penal Code, and,

> "Thus this case presents in an important respect virtually the identical question posed in the *Butler v. Michigan,* and should be considered with that case." [Jur. Stat. p. 23.]

There is no merit to appellant's contention. There is nothing in the *Wepplo* case, *supra,* or in any other California cases cited, that can be fairly construed as holding that:

> "The Michigan and California statutes, as interpreted are strikingly similar." [Jur. Stat. p. 21.]

In the *Wepplo* case, *supra,* the court set forth the pertinent provisions of Section 311, Subdivision 3 of the Penal Code and stated:

> "A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.' (*Commonwealth v. Isenstadt* (1945), 318 Mass. 543 [62 N. E. 2d 840, 844]; see, also, *United States v. Dennet* (1930), 39 Fed. 2d 564, 568; *Dunlop v. United States* (1897), 165 U. S. 486, 501 [17 S. Ct. 375; 41 L. Ed. 799, 804].) The question whether any particular book is obscene or indecent is primarily one of fact, to be decided by the jury."

There appears to be no relationship between the decision in the case of *Butler v. Michigan* (cited by appellant) and the California cases. Appellant's attempt to include the California statute within the framework of the holding in the *Butler* case, *supra,* appears to be strained in an effort to gain jurisdiction by this court.

3. Under Subdivision 3 of appellant's first contention he states: "THE CONSTRUCTION AND APPLICATION OF THE STATUTE AT BAR, AND THE PROSECUTION CONDUCTED UNDER THE SAID STATUTE IN THE PROCEEDINGS BELOW, PARTICULARLY VIOLATE PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW, AND DENY AND ABRIDGE FREEDOM OF SPEECH, PRESS AND THOUGHT IN PARTICULAR AND AGGRAVATED MANNER, ALL IN CONTRAVENTION OF THE FIRST AND FOURTEENTH AMENDMENTS." [Jur. Stat. p. 23.]

In *Snyder v. Massachusetts* (1933), 291 U. S. 97 (54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575) the following pertinent language appears:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all to reasons that brought the rule into existence. (U. S. S. Ct. p. 114.)
>
> . . . . . .
>
> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. (U. S. S. Ct. p. 116.)
>
> . . . . . .
>
> "The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could

> be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (U. S. S. Ct., p. 122.)

The appellant admits that "The complaint was in the exact language of the statute" [Jur. Stat. p. 5] It is the law in California that a complaint charging a public offense in the language of the statute is sufficient. (*People v. Saffel* (1946), 74 Cal. App. 2d Supp. 967; *People v. Ryan* (1951), 101 Cal. App. 2d Supp. 927.) Further, the failure to demur to the complaint or move in arrest of judgment shall be deemed a waiver of the objections of the pleadings. (Secs. 1012, 1185, Pen. Code; *People v. Freudenberg* (1953), 121 Cal. App. 2d 564, 593.) Appellant was tried according to the procedural laws of California. Certain exhibits were introduced in evidence. [Jur. Stat. pp. 6-8.] The trial and appellate court found the appellant guilty of the offenses charged in Count I—keeping obscene books for sale, and Count II—advertising such books for sale. There was no denial of procedural due process.

Appellant's contention that the code section in question, "Abridges Freedom of Speech, Press and Thought" is without merit.

In *People v. Arnold* (1954), 127 Cal. App. 2d Supp. 844, 846-847, it is stated:

> "Freedom of speech and of the press implies the right freely to utter and publish whatever a citizen may please with immunity from legal censure and punishment for the publication so long as it is not

harmful in its character when tested by such standards as the law affords. (*People v. Osborne* (1936), 17 Cal. App. 2d Supp. 771, 778 [59 P. 2d 1083].)

"The chief purpose of the constitutional guarantee is to prevent prior restraint, but it is also a positive injunction against the curtailment of the right of expression, including circulation, after it is made. (*People v. Armentrout* (1931), 118 Cal. App. Supp. 761, 769 [1 P. 2d 556].)

"Neither of these freedoms is absolute, but each must be measured by the public welfare and limited by it. (*Chrisman v. Culinary Workers Local No. 62* (1941), 46 Cal. App. 2d 129, 132 [115 P. 2d 553].) Where the rights of others are interfered with, such rights may be protected under our laws and constitutions. (*People v. Northum* (1940), 41 Cal. App. 2d 284, 289 [106 P. 2d 433].) The guarantee of free speech does not carry with it freedom from responsibility for any abuse of that right. (*Werner v. Southern Calif. Assoc. Newspapers* (1950), 35 Cal. 2d 121, 124.)

. . . . . .

"Appellee's contention, therefore, in reality is a plea, not for liberty, but a plea for release from the responsibility of liberty.

"In *Near v. Minnesota, ex rel. Olson* (1931), 283 U. S. 697, 707 [51 S. Ct. 625, 628, 75 L. Ed. 1357, 1363], the court says: 'In maintaining this guaranty [liberty of the press and of speech], the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted.'"

In *Besig v. United States* (1953), 208 F. 2d 142, 147, the court stated:

> "The point that the Constitutional guarantee of freedom of speech or of the printing press (or, we may add, of the radio and television), is violated, is without merit. The point is made and the only argument to sustain it is simply that the books, since they have some literary merit, are not obscene. We have decided otherwise."

See:

Burke v. Kingsley Books, Inc., et al., 142 N. Y. S. 2d 735.

II.

The Code Section in Question Does Not Infringe on Any Federal Law.

The appellant's second point is as follows:

> "THE STATUTE, PENAL CODE, SECTION 311, AS APPLIED HERE TO THE MAILING OF CIRCULARS AND THE KEEPING OF BOOKS FOR SALE BY MAIL IS REPUGNANT TO ARTICLE I, SECTION 8, CLAUSE 7 OF THE UNITED STATES CONSTITUTION AND UNLAWFULLY INFRINGES ON A SPHERE OF ACTIVITY BESERVED EXCLUSIVELY TO THE FEDERAL GOVERNMENT RESPECTING WHICH THE FEDERAL GOVERNMENT HAS FULLY LEGISLATED, PREEMPTING THE FIELD." [Jur. Stat. p. 25.]

In support of his contention, the appellant makes certain statements. First, he states that he was convicted of two counts on a complaint charging a violation of Section 311, Subdivisions 3 and 4 of the California Penal Code "making it a crime to advertise or keep for sale obscene books." [Jur. Stat. p. 2.]

Then in an effort to cloud the issues before this court, and to gain jurisdiction on an issue unsupported by the record, the appellant makes the following statements:

> "The judgment sought to be reviewed here is a *criminal conviction* in two counts under Section 311, Subdivisions 3 and 4 of the California Penal Code for the *keeping for sale by mail* and for *advertising by mail* 'obscene and indecent' books." [Jur. Stat. p. 5, emphasis added.]

> "*Appellant was convicted* under Count II . . . . *for mailing circulars* . . . and under Count I . . . for keeping in his warehouse *books to fill by mail orders received by mail*." [Jur. Stat. p. 8, emphasis added.]

> "Appellant was in the mail order business and was convicted because he *mailed* circulars advertising books which were held to be obscene and because he kept those books for sale *by mail*." [Jur. Stat. p. 25, emphasis added.]

The record does not support appellant's statement that he was convicted for using the United States mail to advertise or distribute his obscene wares.

The question here presented has been fully and correctly answered by the Appellate Court in its decision wherein it is stated:

> "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares—and that some of his books were obscene we do not consider debatable—does not render the state statute, Section 311, inoperative. See *In re Phoedovius* (1918), 177 Cal. 238, 246, 170 P. 412; *Zinn v. State* (1908), 88 Ark. 273, 114 S. W.

227, 228; *Ex parte Williams* (1940), 345 Mo. 1121, 139 S. W. 2d 485, 491, which cites *In re Phoedovius, supra*, certiorari denied in U. S. Supreme Court, *Williams v. Golden*, 311 U. S. 675, 61 S. Ct. 42; 85 L. Ed. 434; *Railway Mail Association v. Corsi* (1945), 326 U. S. 88, 95, 65 S. Ct. 1483, 89 L. Ed. 2072, 2077." [Jur. Stat. App. A, p. 3.]

The fact that Congress has power to punish a person for sending obscene matter through the mail does not prevent the state from passing a law to punish a person for violating Section 311 of the Penal Code—keeping and advertising obscene matter for sale, etc. (*People v. McDonnell* (1889), 80 Cal. 285; *People v. Grosofsky* (1946), 73 Cal. App. 2d 15.) Section 311 does not infringe upon or conflict with any federal statute or the constitution and said code section covers an area in which the federal statutes have no application. Furthermore, the same act may constitute an offense equally against the United States and the state. (*Pettibone v. United States*, 148 U. S. 197, 37 L. Ed. 419, 13 S. Ct. 542; *State v. Moore*, 143 Iowa 240, 121 N. W. 1052; 15 Am. Jur. p. 68; *Cross v. North Carolina*, 132 U. S. 131, 33 L. Ed. 287, 10 S. Ct. 47.) The instant case is not a contest for jurisdiction over the person between the federal and state court. (*People v. Branch* (1955), 134 Cal. App. 2d 572.)

III.

There Is Nothing in the Jurisdictional Statement, or the Opinion of the Appellate Court [Jur. Stat. Ex. A] That Presents a Substantial Federal Question.

The Appellate Department of the Superior Court of Los Angeles County in its opinion, among other things stated:

> "We see no good purpose to be served by a discussion of either the evidence, which we find sufficient to support the judgment, or of the other contentions advanced." [*People v. Alberts* (1955), 138 A. C. A. 513, 515. See also opinion on denial of a rehearing *Id.*, pp. 515-516. Jur. Stat. Ex. A, pp. 4-5.]

The opinion of the highest court of the state did not discuss every feature of the case and may have rested upon a non-federal ground. When it appears that the judgment "might" have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment, when the question of the existence of an adequate state ground is debatable. (*Stembridge v. Georgia* (1952), 343 U. S. 541, 96 L. Ed. 1130, 72 S. Ct. 834.)

Conclusion.

For the foregoing reasons there is no substantial federal question presented. The code section in question is not vague or ambiguous nor does said section deprive appellant of Freedom of Speech or the Press, nor was he denied due process of law, nor does the code section conflict with or infringe upon any federal statute or the Constitution.

Appellee believes that appellant has failed to present to this Honorable Court a substantial federal question and, therefore, appellee moves that the appeal herein be dismissed, or the convictions appealed be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

DAVID S. ALBERTS,
Appellant,

vs.

STATE OF CALIFORNIA,
Appellee.

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

BRIEF FOR THE APPELLEE

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

DAVID S. ALBERTS, *Appellant,* vs. STATE OF CALIFORNIA, *Appellee.*		No. 61

BRIEF FOR THE APPELLEE

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

QUESTIONS PRESENTED FOR REVIEW

1. Does the California statute, on its face, and as construed and applied, violate the appellant's rights guaranteed by either the First Amendment to the Constitution of the United States,[1] in that it encroaches

[1]Throughout the brief the appellee will assume that the provisions of the First Amendment to the Constitution are so incorporated in the Fourteenth Amendment as to make the provisions of this First Amendment as applicable to the legislative power of the states, as they are to Congress. *(Winters v. New York* (1947), 333 U.S. 507, 508, 92 L.Ed. 840, 846, and cases cited therein.)

on his rights to freedom of speech and of the press; or his rights under the Fourteenth Amendment to the Constitution of the United States, in that the wording of that statute is so vague and indefinite as to render its application to him a taking of his property and liberty without due process of law?

2. Does the California statute, as applied here, violate Article 1, Section 8, Clause 7 of the United States Constitution respecting federal postal power, in that the statute, as applied to appellant, invades the exclusive power of the Federal Government to regulate postal matters?

STATUTE INVOLVED

Section 311, subdivisions 3 and 4 of the Penal Code of the State of California provides, so far as here material:

> "Every person who wilfully and lewdly, either:
>
> . . . . . .
>
> "3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, cases, or otherwise makes any obscene or indecent figure; or,
>
> "4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . ."

is guilty of a misdemeanor punishable by fine and imprisonment.

STATEMENT OF THE CASE

On June 10, 1955, appellant was found guilty of two counts of violating Section 311 of the Penal Code of the State of California, which charged him, in Count I, with writing, composing, stereotyping, printing, publishing, selling, distributing, keeping for sale and exhibiting obscene and indecent writings, papers, and books, and, in Count II, with writing, composing and publishing a notice and advertisement of an obscene and indecent writing, paper, book, picture, print and figure, in violation of Subdivisions 3 and 4 of said code section.

Appellant was placed on probation for two years on condition that he not violate California Penal Code Section 311 or have in his possession any obscene or indecent literature or picture for two years, and with a further condition that he serve 60 days in the County Jail and pay a fine of $500. (R. 1-5.)

A synopsis of the facts upon which the appellant was convicted is as follows:

FRANK W. BRIDGES is a deputy sheriff attached to the vice detail. On February 25, 1955, at approximately 1:00 p.m., he commenced a search of the premises located at 8733 Santa Monica Blvd. He had a search warrant. (R. 24, 25.) This is the location where the appellant maintains a warehouse. (R. 100.)

A bundle of small booklets, approximately 3 inches by 4½ inches and bearing the titles: (1) "Ballad of

a Nun and Other Poems," (2) "Homosexual Life," (3) "Letters of the Courtesans," (4) "How To Be Married Though Happy or How To Be Happy Though Married," (5) "The Prostitute and Her Lover," (6) "The Love Affair of a Priest and a Nun," (7) "Amorous Tales of the Monks," (8) "Wild Women of Broadway," (9) "Strange Marriage Customs," (10) "Confessions of a Minister's Daughter," and (11) "The Fleece of Gold," included in People's Exhibit 1,[2] were found on one of the shelves at 8733 Santa Monica Blvd. (R. 24-26, 64).

An advertising brochure, marked People's Exhibit 2, was found at the Santa Monica address, on the above date. (R. 26.) The sales brochure, marked People's Exhibit 3, was found at the same time and place. (R. 27).

A series of pictures entitled "Tina's Torture", marked People's Exhibit 4, were found at the same time and place. (R. 27.)

A series of eight booklets bearing the following titles: (1) "Petting as an Erotic Exercise," (2) "Bestiality and the Law," (3) "Male Homosexuals Tell Their Stories," (4) "The Business Side of the Oldest Business," (5) "Questions and Answers About Orogenital Contacts," (6) "The Picture of Conjugal Love," (7) "William Heirens — Notorious Sex Maniac," (8) "Female Homosexuals — Lesbians Tell

[2]All exhibits were received in evidence at R. 64. Therefore, this reference will not be repeated as other exhibits are mentioned.

Their Stories," (9) "Bestiality in Ancient and Modern Times," included in People's Exhibit 5, were seen by the witness at the same time and place. (R. 27, 28.)

Twenty packets of pictures, one of which shows girls tied to a dental or barber chair, included in People's Exhibit 6, were seen by the witness at the same time and place. (R. 28.) There was more than one copy of all of the exhibits previously identified by the witness at the location on Santa Monica Blvd. In each instance, the officers took six copies, so that there were at least five duplicates of each exhibit. (R. 28, 29.)

Additional books, pamphlets, stereo-slides and pictures in large numbers, hundreds and possibly thousands, were also taken from the same warehouse. (R. 30, 31.) Another sales brochure was marked People's Exhibit 8. (R. 32.) The witness testified that a photograph of a figurine of a hula girl was similar to one of the figurines taken from the location. It appears in the portion of the paper described as "Learn Nancy's Secret, Naughty Nancy." (R. 32, 33.) The witness saw more than one brochure similar to People's Exhibit 8 at the same time and place. (R. 33.)

Several mailing lists that were not in duplication were taken at the same time and place. (R. 33.)

The witness observed more than six copies of the books which comprised People's Exhibit 9 at the Santa Monica Blvd. location. (R. 45.) There were six or more copies of the book "Sword of Desire" (People's Exhibit 11) at the location on the occasion of the search. (R. 45, 46.)

It was stipulated that a copy of the inventory of the items taken was given to "the person at the address." (R. 45.)

RUSSELL GARDNER is a deputy sheriff and one of the investigating officers in this case. (R. 34, 35.) On the 25th of February, he investigated the building at 8620 Melrose Boulevard (R. 35) (where appellant, David S. Alberts, maintains a mail order business. [R. 100.]) The witness had a search warrant. (R. 36.) The witness saw People's Exhibit 8, or a similar brochure, at that location. (R. 35.)

In the building there were various types of machinery such as typewriters, addressing machines and mail bags. There were also numerous brochures of the nature already described by the witness. (R. 35.)

At the time, six women were in the rear portion of the building, busy typing addresses from an address list to envelopes which contained "these various brochures." There were also various books, records, mail lists and other pamphlets at the location, together with shelves for storage of "these materials." (R. 35, 36.)

Six books entitled (1) "To Beg I Am Ashamed," (2) "Witch on Wheels," (3) "The Pleasures of the Torture Chamber," (4) "Snow Job," (5) "She Made It Pay," and (6) "Sword of Desire," included in People's Exhibit 9, were "recovered" from the same location. (R. 36, 37.)

Ten issues of a magazine entitled "Good Times", marked People's Exhibit 10, were found at the same

place and time as the other exhibits and there were more "than this series." (R. 37.)

The witness noticed a yellow slip of paper protruding from the book entitled "Sword of Desire" (then a part of Exhibit 9),[3] and noted that the wording on the yellow slip was, "Important notice: Due to circumstances beyond our control it was necessary to make a substitution in your order. When we do so we always substitute an item of more select nature. We have done so in this case." (R. 37, 38.) The book "Sword of Desire" and the yellow slip were withdrawn from Exhibit 9 and marked People's Exhibit 11. (R. 38.)

A box containing thirteen stereo-slides and a stereo-viewer, People's Exhibit 12, was found at the Melrose location, at the time of the search, together with the other boxes of slides, including duplicates of Exhibit 12. (R. 38, 39.)

An envelope containing a comic strip consisting of several sequence sheets entitled "Madame Olga's Recruits" and negatives for them, are People's Exhibit 13, and were found in the same building as the aforesaid exhibits. (R. 39.)

An envelope containing several sheets, four photographs to a sheet, in which appeared one or more girls, People's Exhibit 14, had been seen by the witness before. (R. 39, 40.) An envelope containing negatives and prints of the figure or figures of girls or women,

[3]Note, infra, later withdrawn from Exhibit 9 and made Exhibit 11.

People's Exhibit 15, was seen by the witness "at the location . . . on February 25, 1955." (R. 40.)

An envelope with negatives, and prints of the negatives in which appeared two women, one of whom appears to be strapped in a barber's chair, People's Exhibit 16, was found at the same time and place. (R. 40.)

TANAGRA REGAS was employed by appellant at 8627 Melrose Avenue as a file clerk. (R. 47.) She has seen brochures of the type included in People's Exhibit 2 at the location on Melrose Avenue and knows that they were mailed from that location. (R. 47.)

She affixed a gummed label to an envelope which contained a notation "Male Merchandise Mart," and used that name as part of the return address of that location. (R. 47, 48.) She used the names "S Shop" or "Stagg Shop" "as" the return address on envelopes mailed from "that location." The words "Sailor Jock's Club" were used as a return address on envelopes "out of that location." There were five persons employed there. (R. 48.) The witness received letters in her basket which appeared to be addressed to "this location." One of these letters, People's Exhibit 17, was one of the letters she received to work upon. (R. 49.)

ROBERT J. WALLACE is a deputy sheriff attached to the vice detail. On February 25, 1955, he proceeded to 11064½ Strathmore Drive in West Los Angeles with a search warrant for that address. Appellant and his wife were there. (R. 51, 52.) The Appel-

lant was shown a copy of the search warrant and the witness was admitted into the apartment wherein he found a brochure similar to People's Exhibit 3. Another brochure found at the Strathmore location is People's Exhibit 18. (R. 51, 52, 53.)

Four booklets entitled "Padlocks and Girdles of Chastity," "Straps and Stripes," "Memoirs of a Spankee," and "Slaves of the Lash," People's Exhibit 21, a pamphlet entitled "Unique for Lovers of the Unusual," People's Exhibit 22, were found in the house "at that location." (R. 55.) There were duplicates of "Straps and Stripes," "Memoirs of a Spankee," and "Slaves of the Lash." (R. 55.)

People's Exhibit 17 was received into evidence for the limited purpose of showing the procedure (of the handling of letters at the establishment in question) and not "from the standpoint of what the letter contains." (R. 64.)

All exhibits were received in evidence. (R. 64.) There was no objection to the other exhibits being received into evidence.

The appellant, David S. Alberts, maintains a mail order business in Los Angeles County, at 8627 Melrose Ave. and 8733 Santa Monica Blvd. (R. 100.) Appellant knows the books entitled "Witch on Wheels," "Snow Job," "She Made It Pay," and "Sword of Desire." (Exhibits 9 and 11.) He has seen the books. He had some in his business office. (R. 102.)

The brochures, which are People's Exhibits 2 and 3, are made up by an advertising agency employed by

appellant. (R. 105, 106.) Appellant directed the brochure, Exhibit 2, be sent out of his establishment. (R. 108.) He knew about the reading material found in the books listed in People's Exhibit 3. (R. 107.)

The group of cartoons known as "Olga's Recruits," People's Exhibit 13, was directed by appellant to be sent out through the mail. (R. 108-109.) Appellant had general knowledge of the type of reading material listed in People's Exhibit 3, and had been advertising them since February, 1954. (R. 107.)

SUMMARY OF ARGUMENT

Appellee contends:

(1) That the state has the exclusive right, the power and the duty to protect its citizens' health, general welfare, and morals by enacting laws for such purposes.

(2) That statutes which prohibit, restrict or regulate obscene matter come directly within such state power.

(3) That such statutes are not in conflict with the Federal Constitution, do not violate the First Amendment with reference to freedom of speech or press, nor are they unconstitutionally vague or indefinite, nor do they violate any other precept of due process under the Fourteenth Amendment.

(4) That the facts of the instant case clearly show that appellant was guilty of possessing and advertising

for sale, obscene and indecent literature, pictures and other articles; that the California law here involved, as here applied by the California courts, is definite, certain and in no way violates any provision of the Federal Constitution.

(5) The facts show no usurpation of the federal postal power.

Therefore, the convictions in the instant case should be affirmed.

I.

THE STATES HAVE THE POWER TO RESTRICT, PROHIBIT OR REGULATE OBSCENITY.

The police power of the states includes those inherent governmental powers which, under the United States Constitution, are reserved to the several states to promote and to protect the order, safety, health, morals and general welfare of its citizens. It is an indispensable prerogative of sovereignty.

This power may be exerted to preserve the public morals by regulating and preventing such acts, practices and occupations as are in themselves immoral or indecent or have a tendency to promote immorality or indecency. (16 C.J.S. 923, Sec. 186 and case cited.)

It seems incontrovertible that matters which are obscene are also immoral and indecent, in fact the very definition of obscenity encompasses these terms.

The inclination of a percentage of mankind to ignore conventionalities, moral codes and inhibitory statutes and to indulge in licentious practices arising from the sex impulse is too well known to the student of history and sociology to require extended discussion. They have been prohibited in every land of recorded history from ancient Babylon (Code of Hammurabi) to the present time.

By reason of the continued presence of such element whose lack of restraint would, by subverting the common morality, weaken the foundations of an approved social order, the Legislature may suppress the practice deemed inimical to the state and may adopt such measures as may be reasonable to effectuate its purpose. *(In re Maki* (1943), 56 Cal. App. 2d 635, 640, citing *Purity Extract and T. Company v. Lynch,* 226 U.S. 192 [57 L.Ed. 184].)

Furthermore, in testing the legislative judgment with respect to the necessity for the enactment of regulatory laws in the absence of a judicial determination to the contrary, the presumption is that the Legislature's action in passing such a law was supported by known facts requiring the enactment. *(South Carolina State Highway Department v. Barnwell Brothers* (1938), 303 U.S. 177 [82 L.Ed. 734].)

The legislatures of 47 states, (all but the state of New Mexico), which have enacted laws which prohibit and regulate obscene matters could well have found facts which led them to believe that the uncontrolled and unrestricted distribution, and sale of ob-

scene, indecent, salacious and lewd material would lead to a lowering of the moral standards of its populus and would directly affect a substantial number of its citizens. The very fact that such legislation is so universal would support such a statement.

In *State v. Becker* (1954), 272 S.W. 2d 283, 286, the Supreme Court of Missouri affirmed a conviction for selling and possessing "certain obscene, indecent, scandalous and immoral publications . . ." and in its discussion, stated:

> "The people of this state speaking with their constitutional voice, the general assembly, enacted this statutory proscription of obscenity for the protection of *all* the people of the state. Under this statute and the prior rulings of the courts we may not disregard an unambiguous enactment which has as its obvious purpose the protection of the morals of the susceptible into whose hands these publications may come. While we recognize that morality may not be attained by legislation, a people none the less need and deserve a moral standard and the protection and enforcement of such a statute.
>
> . . .
>
> "In any event, we live today in a clothed civilization. The people of Missouri exercised the state's sovereign police power in enacting this statute, and we may not by judicial fiat invade the legislative function and rule that the people of Missouri did not mean what this unambiguous statute so exactly and solemnly declares, and in so ruling be untrue to our responsibility and to the public trust reposed in us."

A case decided as recently as February 27, 1957, *One, Inc. v. Otto K. Oleson,* No. 15139, ... F. 2d ....., (Ninth Circuit),[4] in holding a certain publication obscene, reviews the definitions and tests of obscenity used and approved by the federal courts. In discussing the terms "obscene, lewd, salacious, filthy or indecent," the court stated:

> "These words can only be defined by some discussion of the moral sense of the public, and it is only to such extent that we are concerned with public morals. In approaching the moral side of the issue here presented, we are not unmindful of the fact that morals are not static like the everlasting hills, but are like the vagrant breezes to which the mariner must ever trim his sails. . . ."

It is therefore apparent that statutes dealing with obscene, lewd and salacious matter come within the power of the state under the broad powers reserved to them by the Federal Constitution and their inherent sovereign power.

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[4]In view of the importance and recent date of this case, we have inserted the full text in an appendix to this brief.

II.

CONSTITUTIONALITY OF OBSCENITY STATUTES

Appellant's principal attack on the constitutionality of obscenity statutes is twofold: First, that statutes which prohibit or restrict obscene literature or writing violate freedom of speech and press contrary to the terms of the First Amendment; and second, that the terms "obscene," "lewd," "salacious," and other similar terms which are used in this type of statute, are so vague and indefinite as to deny appellant due process of law under the Fourteenth Amendment.

A careful analysis of these contentions leads to the conclusion that they are without foundation and that statutes which prohibit and curb obscenity are constitutional.

A. Statutes Which Prohibit, Control or Regulate Obscene Literature Are Not in Conflict With or in Contravention of the First Amendment to the United States Constitution.

Freedom of speech and of the press protects the right freely to utter and publish whatever one chooses with immunity from punishment. However, neither of these freedoms is absolute and unrestricted, each must be measured by the public welfare and limited by it. It has always been recognized that when the rights of others are interfered with or affected by speech and publications, such rights may be protected under our

laws and constitution. The guarantee of free speech and free press has never carried with it freedom from responsibility for abuse of those rights.

It has long been held that the right of freedom of speech and press is subject to the state's right to exercise its inherent police power and that clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter is not barred by the free speech or free press guarantee of the First Amendment. This has been held by state courts (See *Burke v. Kingsley Books* (1955), 142 N.Y. S. 2d 735; *People v. Doubleday & Co., Inc.*, 297 N.Y. 687, 77 N.E. 2d 6, affirmed by equally divided court, 335 U.S. 848, 93, L.Ed. 398; *State v. Becker, supra*, 272 S.W. 2d 283 [Mo.]; *Commonwealth v. Donaducy* (1950), 76 A. 2d 440 [Penn.]) and recognized by this court. (See *United States v. Alpers* (1950), 338 U.S. 680, 94 L.Ed. 457; *Winters v. New York* (1948), 333 U.S. 507, 510, 518, 520, 92 L.Ed. 840; *United States v. Limehouse* (1932), 285 U.S. 424, 76 L.Ed. 843; see also *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 571, 572, 86 L.Ed. 1031; *Near v. Minnesota* (1931), 283 U.S. 697, 716, 75 L.Ed. 1357; *Beauharnais v. Illinois* (1952), 343 U.S. 250, 266, 96 L.Ed. 919.)

In the *Chaplinsky* case, *supra*, at 315 U.S. 571-572, this court stated:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circum-

> stances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the *lewd* and *obscene,* the profane, the libelous, and the insulting or 'fighting' words . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Emphasis added.)

Appellant's brief assumes that the only restriction placed on the freedom of speech and press, is that presented by facts showing a clear and present danger of resulting criminal conduct; that the exposition of ideas, even though admittedly obscene, has not been shown to create a clear and present danger of such conduct, and that therefore the prohibition of obscene literature is unconstitutional under the provisions of the First Amendment.

In support of this assumption, appellant has quoted excerpts from articles, papers and texts referring to the effects of literature on the conduct of individuals. (App. Br., pp. 64-73.) However, none of these authorities purport to be conclusive, and it is admitted that in the fields in which studies of this type have been made and research done, there is a conflict of ideas. Many of the leading experts feel that there is a definite correllary between the exposition of ideas and conduct,

while others feel that there is no correlation whatsoever.[5]

The clear and present danger exception to the rights of free speech and press is not the only limitation on such rights, (as discussed hereafter). However, the legislation in question can be sustained pursuant to the clear and present danger doctrine, as well as otherwise.

It is a basic rule of judicial interpretation and examination of statutes that the legislative body is conclusively presumed to have investigated the facts and found necessity for the particular exercise of police power. (*South Carolina State Highway Department v. Barnwell Brothers, supra*, 303 U.S. 177 [81 L. Ed. 734]; *Burke v. Kingsley Books* (1955), 142 N.Y.S. 2d 735, 753, quoted at p. 21 of this brief.)

Only if the legislative body is clearly wrong as to the factual matters, including the occasion for the legislation and the causation of the evil sought to be remedied, will the courts invalidate the statute for these reasons and this is so in addition to the general doctrine that legislation is strongly presumed to be constitutional.

Every presumption favors the validity of a legislative enactment, and though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

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[5]See Comic Book Regulation—Fedder (1955), Bureau of Public Administration—University of California, for a lengthy discussion of the conflict of opinion with respect to the effect of comic books on our youth.

(*West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379, 81 L. Ed. 703, 108 A.L.R. 1330, affirming *Parrish v. West Coast Hotel Co.*, 55 P. 2d 1083, 185 Wash. 581; *Nebbia v. People of the State of New York* (1934), 291 U.S. 502, 537-538, 78 L. Ed. 940, 957.)

So that appellant, in contending that the statute here involved is unconstitutional, for lack of clear and present danger, undertakes a double burden: First, he must overcome the general strong presumption of constitutionality and, second, he must demonstrate by an overwhelming weight of authority that the legislative findings of fact are unsound.

The California Legislature, in enacting the statute attacked, and that of every other state (except New Mexico) enacting similar legislation, and the Congress of the United States, in contemplation of law, must have found that the sale and distribution of obscene matters presents a clear and present danger of criminal conduct resulting therefrom to an extent that there is occasion for society to seek to prevent these effects. (*Burke v. Kingsley Books, supra*, 142 N.Y.S. 2d 735, 753, as quoted as p. 21 of this brief.)

This belief is shared by society generally, as well as by the many jurists writing opinions favoring the validity of such legislation in the cases cited elsewhere in this brief.

Indeed, until very recent years, no one, to our knowledge, questioned these findings. Even now, no one, including appellant, contends that there is unimimi-

ty of expert opinion and scientific finding in this regard.

Since the record is devoid of expert evidence at the trial that obscene matters do or do not affect or effect human conduct to the detriment of society's morals, health and welfare, this court can only draw on its power of judicial notice in this regard. Appellant's references[6] by which he hopes to cast doubt on these effects are only proper for the consideration of this court if they are proper sources of judicial notice.

Such judicial notice, in scientific matters, can only be exercised where there is a substantial agreement of the authorities.

> "Scientific facts, in order to attract judicial notice, must be universally known, so that they are found in encyclopedias and dictionaries, or in the treatises of standard authors, or must be of such notoriety and so generally understood that they have become a part of the common knowledge of all. 15 R.C.L. Sec. 55." (*Raney & Hamon v. Hamilton & White* (1921), Tex. Civ. App., 234 S.W. 229, 231; see also 31 C.J.S. Evidence Sec. 76, pp. 659-660.)

For example, could this or any court take judicial notice, if it were pertinent to a case, that the "red shift", in the spectrum of light from distant stars, is caused by the recession of the sources in an expanding universe, rather than that it is caused by the "tired

[6]See App. Br., pp. 64-79.

light" effect? Judicial notice is improper in scientific matters where the authorities are in conflict.

The discussion as to whether or not sex crimes are so inspired, and whether juveniles are rendered delinquent, both in appellant's brief and Judge Frank's opinion,[7] assumes that the determination of the constitutionality of such statutes turns on the answers to these questions.

The doubt, if any, that the use of obscene matters affects or causes immoral or violent antisocial human conduct,[8] which is the best appellant can claim by his social authorities, would hardly seem sufficient to overcome the two presumptions cited, and the findings of the legislative bodies mentioned, which support the exercise of the police power under consideration.

In *Burke v. Kingsley Books*, supra, 142 N.Y.S. 2d 735, 753, the court said:

> " . . . The publication and distribution of material devoted to obscenity, lewdness, lasciviousness, filth, indecency and disgust—to crime, sex, horror, terror, brutality, lust and depravity—have been found by the Legislature to be a contributing factor to juvenile delinquency, a basic factor in impairing the ethical and moral development of our future citizens, and a *clear and present danger* to the people of our State. As such, these are, it seems to me, 'matters of state concern' 'in which the city is [also] interested.' " (Emphasis added.)

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[7] In the companion, consolidated case of *United States v. Roth* (1956) 237 F. 2d 796, 801-827.

[8] Turning on a series of socio-psychological phenomena rather than legal conclusions.

Heretofore, we have assumed, as does appellant in his brief, that the statute can be sustained only in the event that this court is convinced that the use of obscene articles creates a clear and present danger of the commission of overt sex crimes by the user. This assumption completely overlooks a number of other effects of such articles, any one of which warrants the exercise of the police power of the State.

No mention is made of several large groups of citizens entitled to consideration in this matter.

A large segment of the population, far from being stimulated erotically by obscenity, reacts with repulsion and disgust to such articles. This is particularly true of most women as noted by Kinsey in his Study of Sexual Behavior in the Human Female,[9] nor is this reaction confined to women. So, too, some men have cultivated standards of a degree of nicety, particularly in the field of sex, that a blatant display of the crudest physical aspects of the erotic is repellent to them. A common observation of those in law enforcement work is that a child suddenly confronted with a portrayal of perverted sexual matters reacts with extreme shock and terror. We are aware of this court's holding in the *Butler* case[10] passing on a statute aimed *only* at that which affects children, holding, in effect, that such a statute is unconstitutionally broad and that the deprivation of such materials to adults in order to avoid

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[9]Kinsey, Pomeroy, Martin, Gebhard, W. B. Saunders Co. Philadelphia, 1953, pp. 652, 653.

[10]*Butler v. Michigan* (February 25, 1957), 352 U.S. ....., 1 L.Ed. 2d 412

its effect on children is, in effect, to "burn the house to roast the pig."[11] We do not read the case to hold that, in considering the effect of obscene material affecting all age groups, its effect on children may not be considered.

Appellant, no doubt, would reply that such persons need not look at or read such material. Our answer to that argument would be that not all such publications warn the prospective reader as well as do those which were a part of appellant's stock in trade and are in evidence in this case. Such titles as "Petting as an Erotic Exercise", and "Questions and Answers About Oragenital Contacts"; serve fair warning of their contents. An example, from another case, to the contrary is, "Memoirs of Hecate County", by Edmund Wilson,[12] (held obscene in the Appellate Department of the Superior Court of Los Angeles County in *People v. Pickwick Book Shop* (1947), Cr. A. 2314, and in *People v. Doubleday & Co., supra,* 297 N.Y. 687, 77 N.E. 2d 6, affirmed in 335 U.S. 848, 93 L. Ed. 398.) Other examples are "The Tropic of Capricorn" and "The Tropic of Cancer" by Henry Miller.[13]

Furthermore, in the event of the triumph of appellant's contention in this court, holding that obscenity may not be proscribed, for any or all of the reasons urged, pictures of any degree of pornography, scatolo-

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[11] *Butler v. Michigan, supra,* 352 U.S. ..... 1 L.Ed. 2d 412, 414.

[12] Neither the title nor the name of the distinguished author warn the reader that in an otherwise well-written novel occurs an episode describing in detail the result of a visual examination of female genitalia.

[13] Held obscene in *United States v. Two Obscene Books* (1950), 92 F. Supp. 934; (1951), 99 F. Supp. 760; affirmed in *Besig v. United States* (1953), 208 F. 2d 142.

gy or concupicentiality, could, and no doubt would be, displayed openly, as salable merchandise visible to all, from the most prurient (at whom it would be aimed) to the most prudish (who would be most offended) and the very young (who would be frightened).

Parents constitute another class of persons reacting other than erotically to such materials. Respondent submits that whether or not it is psychologically established that obscenity harms children, the vast majority of parents not only do not wish their children exposed to it, but react with extreme displeasure if the possibility of such contact occurs. Most educators and religious leaders share these views. We submit that the scientific soundness of such opinions and reactions is not the controlling question—such persons are entitled to protection by the State.

Furthermore, since the medium of publication is not pertinent to the principles involved, there is no reason, should appellant's contentions prevail, that in lieu of the Mickey Mouse Club television program, the children assembled before their receiving sets for the purpose of viewing that well-established source of juvenile delight, should not be entertained, instead, by enactments of extracts from appellant's books showing sadomasochistic and oragenital activity. The preference of parents that this type of material be not shown on the family T.V. set, even though mistaken according to appellant's authorities, is entitled to consideration by the State in its exercise of the police power and by this court in examining the necessity therefor.

Appellant's brief exploits fully the bogeymen of the "Thought Police." He states, at p. 15,

> "This statute, however, is devoted solely to the restrictions of books which stimulate ideas, thoughts and desires."

Typical of the language of the many opinions of various courts sustaining statutes similar to the one herein involved under similar attack, is that of the Supreme Court of Missouri in *State v. Becker, supra,* (Mo.) 272 S.W. 2d 283, 286:

> "After applying the required tests, all the members of this court have concluded that the contents of these publications *tend to incite lascivious thoughts, arouse lustful desire,* encourage breaches of the law, and promote and encourage commission of crime, law violation and *moral decay.* . . . .
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> "It has been long held that the right of freedom of speech is subject to the State's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances. Such right does not include the right to possess with intention to sell and circulate any lewd, obscene, indecent, scandalous and immoral publication which, as we have above held, *tends to incite lascivious thoughts and arouse lustful desire,* encourage breaches of the law and *promote* crime and *moral decay.*" (Emphasis added.)

Thus the keeping for sale (as here) of articles which "tend to incite lascivious thoughts, arouse lustful de-

sire . . . encourage . . . moral decay," we contend, is a legitimate exercise of the police power, i.e., the protection of public morals entirely aside from the matter of inciting the user to overt sex crimes. This is not "Thought Control." It is a proper proscription of action as in the case of the keeping of narcotics.

Both the keeping of narcotics and obscene matter (for sale) are passive acts, both of which tend by their ~~ater-effects~~, to destroy moral fibre.

The statute is not an invasion of, but a legitimate exception to the rights of free speech and of the press as guaranteed by the First Amendment to the Constitution.

Commonwealth v. Donaducy, supra, (Penn.) 76 A. 2d 440, at p. 441, quotes a late expression of this court in an opinion ably discussing the matter of free speech and obscenity:

> "In view of the finding that the article is obscene, there is no merit in defendant's contention that his conviction violates the Federal Constitution. The right of the several states to prevent and punish the publication of obscene writings cannot successfully be disputed. . . . *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571,572, 62 S. Ct. 766, 769, 86 L. Ed. 1031. . . . Even in striking down one section of a New York Statute, making it a misdemeanor to disseminate any publication devoted principly to criminal news, police reports, or accounts of criminal deeds or pictures, or stories of deeds of bloodshed, lust or crime, the Supreme

Court of the United States, in *Winters v. People of the State of New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840, inferentially approve another section of the New York act with provisions similar to our own Section 524. In that case the Court said, 333 U.S. at page 510, 68 S. Ct. at page 667, 92 L. Ed. 840: 'Though we can see nothing of any possible value to society in these [crime] magazines, they are as much entitled to the protection of free speech as the best of literature. . . . *They are equally subject to control if they are lewd, indecent, obscene or profane.*' (Italics supplied)".

See also *United States v. Harmon* (1891), 45 F. 414, 417,[14] wherein the language of the opinion is as fresh and applicable to the present case as though written yesterday.

Throughout his brief, appellant has endeavored to magnify possible consequences which he contends might occur as a result of enforcement of obscenity statutes in the field of thought and expression. He paints a picture of such statutes curbing "science, religion, politics and the arts,"[15] not to mention "Causing a sex revolution."[16] This, notwithstanding the fact that obscenity statutes have been part of the law of this country for many years, without the occurrence of any of these consequences. This argument of the conjecturable consequences of enforcement of a statute is effectively answered in *Beauharnais v. Illinois, supra*, 343 U.S. 250, 263; 96 L. Ed. 919, 930, where this court stated:

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[14]Infra, pp. 32-36, where the opinion is quoted at length.
[15]App. Br., p. 78.
[16]App. Br., p. 103.

> "We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'"

Judge Learned Hand, in his often cited opinion in *United States v. Kennerley* (1913), 209 Fed. 119, 120, said:

> "I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses."

B. Obscenity Statutes Are Not Unconstitutionally Vague or Indefinite Under the Fourteenth Amendment.

The appellant has endeavored to demonstrate that the trems "obscene," "indecent," "lewd," "salacious," and terms of similar import, are unconstitutionally

vague and indefinite under the due process clause of the Fourteenth Amendment, and that, therefore, statutes which prohibit, regulate and restrict obscene, indecent, lewd and salacious matter are void.

It is respondent's position that these terms have a sufficient clear and definite interpretation, as reflected by many cases[17] over a long period of years, to resist this attack and further, that the definitions of such terms, in their nature, change and vary, dependent on the mores, ideals and customs of society at any given time. To restrict these terms unduly and to give a fixed interpretation of their meaning, at any such given period, would occasion the evil against which appellant argues so vehemently. But to define such terms within the framework of the community's current concept gives these statutes sufficient definiteness to protect both society from the evils inherent in the dissemination of obscene and pornographic matters, and also the rights of the persons who must meet the standards established by these statutes. As Judge Learned Hand so aptly put it in *United States v. Kennerley, supra,* 209 F. 119, 121:

> " . . . should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which

[17]At p. 4 of Appellee's Statement Opposing Jurisdiction, and Motion to Dismiss or Affirm, the statement is erroneously made that "This court has upheld the validity of these federal statutes as not being unconstitutionally vague or indefinite." The error lies in the use of the word "upheld." Had the word "assumed" been used, the statement would have been accurate. The cases cited for the proposition, as correctly pointed out by appellant in his Brief in Opposition to Motion to Dismiss or Affirm, at p. 2, do not support the word "upheld" which implies a direct attack on the federal statute for vagueness.

the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish a standard much as they do in cases of negligence.

. . . .

"Nor is it an objection, I think that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech."

This court has recently noted "the impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime. . . . " (*Winters v. New York* (1948), 333 U.S. 507 at 518, 92 L. Ed. 840, 851.)

In *People v. Friedrich* (1943), 52 N.E. 2d 120, 122, (Illinois), the subject is treated as follows:

"The words 'obscene' and 'indecent' etc. are words of common usage and are ordinarily used in the sense of meaning something offensive to the chastity of mind, delicacy and purity of thought, something suggestive of lustfulness, lasciviousness and sensuality. It is a well-established rule that in the application of a statute, the words are to be given their generally-accepted meaning, unless there is something in the act which indicates that the legislature used them in a different sense and there is nothing in this act that indicates such intent. Defendant does not contend such words have a dual meaning but argues that one person might see vulgarity and indecency in a picture while another would give it cultural value and consider it a work of art. Such contention does not demonstrate uncertainty or vagueness in the meaning of the words used in the act but rather denotes a difference in the process of valuing the qualities of the picture. Most criminal acts are subject to such condition and each individual must determine for himself and at the risk of punishment, if his conclusion is erroneous, whether his acts constitute a violation of the statute. To the one who is about to engage in the sale of such pictures, the statute is clear as to what is prohibited. His only problem is as to whether the pictures are obscene and indecent. He may honestly conclude they are not and the court or jury determine that they were, but this does not render the statute void for vagueness or indefiniteness.

"In *Nash v. United States*, 229 U.S. 373, 33 S. Ct. 780, 781, 57 L. Ed. 1232, an attack similar to

the one made here was directed against an Act of Congress commonly known as the Sherman Act. Justice Holmes, speaking for the court said: 'And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. . . . . The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. . . . We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.' "

In the early, but well reasoned, case of *United States v. Harmon* (1891), supra, 45 F. 414, 417, the court discusses the term obscenity as follows:

"The statute does not undertake to define the meaning of the terms 'obscene', etc., further than may be implied by the succeeding phrase, 'or other publication of an indecent character.' On the well-recognized canon of construction these words are presumed to have been employed by the law-maker in their ordinary acceptation and use. As they cannot be said to have acquired any technical significance as applied to some particular matter, calling, or profession, but are terms of popular use, the court might perhaps with propriety leave their import to the presumed intelligence of the jury.

"Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls,—the family, which is the common nursery of mankind, the foundation rock upon which the State reposes? . . . Who is to deem, who is to judge, whether a given publication impinges upon the general sense of decency? . . . The answer to this is, that asserted violations of this statute, like other criminal statutes, must be left to the final arbiter under our system of government,—the courts. The jury, the legally constituted triers of the fact under the constitution, is to pass upon the question of fact. Under our institutions of government the panel of 12 are assumed to be the best and truest exponents of the public judgment of the common sense. Their selection and constitution proceed upon the theory that they most nearly represent the average intelligence, the common experience and sense, of the vicinage; and these qualifications they are presumed to carry with them into the jurybox, and apply this average judgment to the law and the facts. Sitting as the court does in this case, in the stead of the jury, it

may not apply to the facts its own method of analysis or process of reasoning as a judge, but should try to reflect in its findings the common experience, observation, and judgment of the jury of average intelligence. How would the language—the subject matter—in this article . . . impress and affect the average man and woman of intelligence and sensibility? What is its probable effect upon society in general? How would such language and matter impress a public assembly of decent men and women? How would it be received in and affect the average family circle of 1,500 subscribers to whom the evidence shows this garbage was sent? The subjects discussed and the language employed are too coarse and indecent for the man of average education and refinement to recapitulate. They are so filthy in thought and impure in terms as not to admit of recitation without a shock to the common sense of decency and modesty; and it does seem to me that it is not too much to say that no ordinary mind can subject itself to the repeated reading and contemplation of such subjects and language without risk of becoming indurated to all sense of modesty in speech and chastity in thought. The appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste. And while it may be conceded to the contention of counsel that the federal government, under its constitutional limitations, ought not to take upon itself the office of *censor morum,* nor undertake to legislate in regulation of the private morals of the people, yet Congress may, as the basis of legislation of this

character, have regard to the common *concensus* of the people that a thing is *malum in se*,—is hurtful to the public welfare. . . . "

In the recent case of *Burke v. Kingsley Books supra*, 142 N.Y.S. 2d 735, 739, the court outlined the history of obscenity statutes as an aid to interpretation. The court, in part, stated:

"The act of obscenity has been an offense against the public order for centuries (See Sir Charles Sydlyes Case, I Keble 620 (K.B. 1663); Harris and Wilshire's Criminal Law, 16th ed., pp. 169-170; 1 Bishop on Criminal Law, 9th ed. Secs. 500, 504; Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40-43). Printed obscenity has been deemed a crime at common law for generations. *Commonwealth v. Holmes,* 17 Mass. 336; see Grant and Angoff, Massachusetts and Censorship, 10 Boston Univ. L. Rev. 52-56. . . . 'It is to be observed that the statute does not undertake to define obscene or indecent pictures or publications. But the words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning.' *People v. Muller,* 96 N.Y. 408, 410.

"The fact that the mores of the times change from one generation to another, or that they are not the same in every land and clime, does not render the statutory definition meaningless. . . . It is now, however, necessary that the language be narrowed in such a manner as to allow no flexibility; rather ordinary terms may be used to express

ideas which adequately describe that which is prohibited when measured by the modes of common usage and understanding in the community. *Sproles v. Binford,* 286 U.S. 374, 393, 52 S. Ct. 581, 76 L. Ed. 1167; *Jordan v. De George,* 341 U.S. 223, 231-232, 71 S. Ct. 703, 95 L. Ed. 886.

"Repeated challenges to the definiteness of the term 'obscene' have been rejected. *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031; *American Civil Liberties Union v. City of Chicago,* 3 Ill. 2d 334, 347, 121 N.E. 2d 585; Lockhart and McClure, Literature, The Law of Obscenity, and The Constitution, 38 Minn. L. Rev. 295, 324-350. There is no question but that the term 'obscene' is sufficiently definite to be used—even in a criminal statute. *Winters v. People of State of New York,* 333 U.S. 507, 518, 68 S. Ct. 665, 92 L. Ed. 840. 'The Legislature has declared in this section (Penal Law, S. 1141) that no obscene, lewd, lascivious, or disgusting book shall be sold. Language could not be plainer.' "

See also *Besig v. United States* (1953), 208 F. 2d 142, 145, where the court, in discussing the problem of the definiteness of the word obscenity, said:

"The word 'obscene' is not uncommon and is used in English and American speech and writings as the word for indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions or to the excrement therefrom.

. . . .

"Whether the moral conventions should be flaunted in the cause of frankness, art or realism,

we have no occasion to decide. That question is for the policy branches of the government. Nor do we understand that we have the legal power to hold that the statute authorizing the seizure of obscene books is inapplicable to books in which obscenity is an integral part of a literary work. . . . The civilization of our times holds to the premise that dirt in stark nakedness is not generally and at all times acceptable. And *the great mass of the people still believe there is such a thing as decency. Indecency is easily recognizable.*" (Emphasis added.)

The essence of the more recent interpretations of the courts in this connection is to regard materials "obscene" in the statutory sense, if its "dominant effect" is that of "dirt for dirt's sake," or as stated in *Dunlop v. United States* (1897), 165 U.S. 486 at 500, 41 L. Ed. 799, 804, whether the publication is " . . . calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

Definitions of obscenity, with their attendant rules of application, have been adopted by a large majority of American courts, and have been regarded as workable, strictly limited to works of pornography and in no way applicable to works of any literary value.[18]

[18]The following are a representative but by no means exhaustive selection:
New York:
Halsey v. N. Y. Society for the Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 (1922) (judgment for plaintiff, seller of Gautier's *Mlle de Maupin*, in action for malicious prosecution).
People v. Wendling, 258 N.Y. 451, 180 N.E. 169, 81 A.L.R. 799 (1932)

The argument that appellant could not know what is considered criminal obscenity under the Penal statute until he was convicted, and that, therefore, the statute is

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(play *Frankie and Johnnie* held not obscene).
People v. Viking Press, 147 Misc. 813, 264 N.Y.S. 534 (1933) (Caldwell's *God's Little Acre* held not obscene).
People v. Miller, 155 Misc. 446, 279 N.Y.S. 583 (1935) (Flaubert's *November* held not obscene).
People v. Gotham's Book Mart, 158 Misc. 240, 285 N.Y.S. 563 (1936) (Gide's *If It Die* held not obscene).
People v. Larsen (Ct. Spec. Sess.), 5 N.Y.S. 2d 55 (1938) (Stills from movie *Birth of a Baby* held not obscene).
People v. Vanguard's Press, 192 Misc. 127, 84 N.Y.S. 2d 427 (1947) (Willingham's *End as a Man* held not obscene).
Sunshine Book Co. v. McCaffrey (Sup. Ct., Spec. Term), 112 N.Y.S. 2d 476 (1952) (Magazine *Sunshine and Health* held obscene).
Brown v. Kingsley Books, Inc., et al., 1 N.Y. 2d 177, 134 N.E. 2d 461 (1956) (Issue here was constitutional, but Court in passing affirmed judgment below that pamphlets called *Nights of Horror* were obscene).

Delaware:
State v. Scope, (Sup'r. Ct. Del.) 86 A. 2d 154 (1952) (A burlesque movie held obscene under "dirt for dirt's sake" test).

Massachusetts:
Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E. 2d 840 (1945). This is the leading Massachusetts case, and combines the modern "dominant effect" test with the old "deprave and corrupt" test of the *Hicklin* rule, 62 N.E. 2d at 844, with the result that Lillian Smith's *Strange Fruit* was held obscene. See also *Attorney General v. Book Named God's Little Acre*, 326 Mass. 281, 93 N.E. 2d 819 (1950)

Ohio:
State v. Lerner, (Ohio Comm. Pl.), 81 N.E. 2d 282 (1948) (*Sunshine and Health* and strip tease photographs held not obscene).
New American Library of World Literature, Inc. v. Allen, 114 F. Supp. 823 (N.D. Ohio 1953) (Upholding Youngstown obscenity ordinance).

Pennsylvania:
The leading case is *Commonwealth v. Gordon*, 66 (Pa.) D. & C. 101 (1949), aff'd *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950). (Upholding constitutionality of Pennsylvania obscene literature statute as construed).

New Jersey:
State v. Weiterhausen, 11 N.J. Super. 487, 78 A. 2d 495 (1951) (Nude photographs held obscene).
Adams Theatre Co. v. Keenan, et al, 12 N.J. 267, 92 A. 2d 519 (1953).
McFadden's Lounge, Inc. v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61, 109 A. 2d 444 (1954).
Adams Newark Theatre Co. v. City of Newark, 22 N.J. 472, 126 A. 2d 340 (1956).

Illinois:
People v. Friedrich, 385 Ill. 175, 52 N.E. 2d 120 (1943).
American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954), appeal dismissed 348 U.S. 979, 99 L.Ed. 763, 75 S. Ct. 572 (1955) (upholding constitutionality of film censorship ordinance).

unconstitutionally vague, is fallacious.[19] There are many statutes which depend upon the judgment of a party prior to an act, and which hold him criminally responsible if he is wrong in his judgment.

Among the oldest concepts of the law, enacted in various statutory contexts, are those of negligence and insanity, and it is a matter of common knowledge that jurors will disagree as to the standard of "the reasonable man" in applying the first, and qualified medical experts will arrive at opposite conclusion, in applying the second. In both instances greater verbal precision cannot be achieved.

Examples of such statutes which have been appealed to this court, wherein unsuccessful attacks were made on their definitenes, are:

Statute prohibiting publications which libel and attack "citizens of any race, color, creed or religion." (*Beauharnais v. Illinois, supra,* 96 L.Ed. 919, 343 U.S. 250); statute prohibiting use of "offensive, derisive or annoying words" or "names" to any person lawfully on a public street. (*Chaplinsky v. New Hampshire supra,* 86 L.Ed. 1031, 315 U.S. 568.) The penalizing of "excessive charges" for service in connection with home loans (*Kay v. United States* (1938), 82 L. Ed. 607, 303 U.S. 1); the making of "loud and raucous" noises (*Kovacs v. Cooper* (1949), 93 L. Ed. 513, 336 U.S. 77); anti-trust legislation which denounced "contracts and

[19] "An analysis of the meaning of the adjectives appearing in this section will serve no useful purpose and there is an inherent impossibility of verbal precision in matters of this kind." *People v. Larsen* (1938), 5 N.Y.S. 2d 55 at 56, a case arising under N.Y. Penal Code, Sec. 1141 (obscenity statute).

arrangements 'reasonably calculated' to fix and regulate the price of commodities, etc." (*Waters-Pierce Oil Company v. Texas* (1909), 53 L. Ed. 417, 212 U.S. 86); a statute providing that "any person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof . . . be guilty of a felony." (*United States v. Ragen* (1942), 86 L. Ed. 383, 314 U.S. 513); the term "political purposes" (*United States v. Wurzbach* (1930), 74 L. Ed. 508, 510, 380 U.S. 396, 399), wherein this court, through Justice Holmes, stated:

> "The other objection is to the meaning of 'political purposes.' This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

In *United States v. Alford* (1927), 71 L. Ed. 1040, 1041, 274 U.S. 264, 267, this court stated:

> "The word 'near' is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule of conduct for anyone who seeks to obey the law."

In *Omaechevarria v. Idaho* (1918), 62 L. Ed. 763,

768, 246 U.S. 343, 348, the word "range" without further definition was upheld. This court stated:

> "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this Court."

In *Kovacs v. Cooper, supra,* 93 L.Ed. 513, 518, 336 U.S. 77, 79, this court, in passing upon the question of definiteness, stated:

> "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Similarly, the common law offense of vagrancy, now commonly enlarged upon by statute, has been held within the police power affecting public health and morals as a proper subject for criminal sanction, notwithstanding contentions that terms such as "every lewd or disorderly person" do not define the elements of the crime; or that words such as "roaming" and "idling" are too broad and indefinite to state a public

offense.[20] In *State v. Harlow* (1933), 174 Wash. 227, 24 P. 2d 601 at 604, the court, in upholding a vagrancy statute as against the contention that it was void for vagueness, said:

> "The terms 'lewd', 'disorderly', and 'dissolute' have no statutory definition. They are words, however, of common and general use, and are easily understood by men and women of average intelligence. We doubt whether definition could make them any clearer."

Again, breach of the peace statutes, which commonly prohibit the use of vulgar and indecent language in specified circumstances, have been upheld against the argument that they are fatally uncertain and set up no ascertainable standards of guilt.[21]

A more striking example of the impossibility of verbal precision is illustrated by the problems posed by the definitions of first and second degree murder. In these cases the defendant's life is at stake, and yet it is generally conceded that the application of these definitions permits the widest scope of a jury's discretion.[22]

There are certain matters which come within the definition of obscenity, so definite and certain as to occasion no argument, and which have been universally and uniformly so recognized.

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[20]See, for example, *Ex parte McCue* (1908), 7 Cal. App. 765, 96 P. 110; *Ex parte Cutler* (1934), 1 Cal. App. 2d 273, 36 P. 2d 441.

[21]See, for example, *People v. Vaughn* (1944), 65 Cal. App. 2d Supp. 844, 150 P. 2d 964.

[22]"Homicide—Murder—Intent to Kill as Affecting the Degree of Murder" (1951), 24 S. Cal. Law Rev. 288; a good illustration of the problem is *People v. Holt* (1944), 25 Cal. 2d 59, 153 P. 2d 21.

No one questions that pictures or literature which portray acts of sodomy, buggery, coprophilia, necrophilia and other unnatural sexual acts, come within the definition of obscenity. Nor can anyone seriously argue that the active portrayal of these acts, or of sexual intercourse or homosexual activity, on television, in motion pictures or otherwise, would not be universally considered obscene.

At the other end of the scale there are situations which today are not considered obscene, but which might have been so considered during the Victorian period. For example, depictions of women in brief bathing suits, or illustrations of women and men embracing or kissing.

Such changes of standards are reflected graphically by evolving definitions of various terms. This is not only true as to the term "obscenity", but also in the use of other terms; for example: speed, height and modesty. These terms have all changed within recent memory, but each has a well recognized and definite meaning today, as do the terms which are presently under attack.

Lying between the black and white of obscenity and purity there is a field of gray supplying a reason and purpose for juries and a court. In the field of obscenity there is an area where an individual knows he must tread lightly, so close to the line that the determination must necessarily be made by the triers of fact in the courts. The fact that an individual who takes the

risk of adventure into the gray zone, is found to be in violation of a statute prohibiting obscenity, does not render its standard vague or indefinite under constitutional guarantees.[23]

Both the Federal[24] and the State Courts have, in countless instances, held the term "obscene" as used in criminal statutes worded similarly to California Penal Code Section 311, subdivision 3 sufficiently definite and certain for due process requirements. The cases in the note below[25] are not an exhaustive compilation, but they represent the present day approach to the problem, which recognizes frankly that "the concept of obscenity remains elusive."

In *United States v. Harris* (1954), 98 L. Ed. 989, 347 U.S. 612, this court stated, at L. Ed. 996:

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[23]It should be noted in passing that certain statutory phrases have posed somewhat different problem with respect to the vagueness concept. These involve words which are capable of being understood in either of two or more distinct senses, and the statute in question has not made clear which sense was intended. See *Lanzetta v. New Jersey* (1939), 306 U.S. 451, 83 L.Ed. 888; *Burstyn v. Wilson* (1952), 343 U.S. 495, 96 L.Ed. 1098; also cf. *U. S. v. Cardiff* (1952), 344 U.S. 174, 97 L.Ed. 200.

[24]Although not in this court. As previously noted (p. 29), this court has assumed, but not squarely held, the constitutionality of these terms, as here attacked.

[25]Cases holding or noting the word "obscene" in a criminal statute sufficiently definite for due process requirements:

Federal:

Rosen v. U. S. (1895), 161 U.S. 29 at 42, 40 L.Ed. 606, 610, "Everyone . . . must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd, and lascivious."

Tyomies Publishing Co. v. U.S. (1914), 211 F. 385.

U. S. v. Dennett (1930), 39 F. 2d 564.

U. S. v. Rebhuhn (1940), 109 F. 2d 512, cert. den.

Rebhuhn v. U. S., 310 U.S. 629, 84 L.Ed. 1399.

New American Library of World Literature, Inc. v. Allen et al (1953), 114 F. Supp. 823, 829: "It thus appears that the trend of authoritative judicial thinking supports the view that the word 'obscene' as used in a criminal statute or ordinance is sufficiently precise to meet the constitutional standards of certainty." 109 F. 2d at 829.

Bonica v. Oleson (1954), 126 F. Supp. 398, 402 (S.D. Cal.): "A determination of the national standard of decency and modesty is not an easy one . . . And yet, almost every aspect of our day-to-day

"If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise . . . and if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this court is under a duty to give the statute that construction."

In *Hallmark Productions v. Mosley* (1951), 190 Fed. 2d 904, 909-910, the following statement is made with reference to the definiteness of the word obscenity.:

"The term obscene is confessedly not susceptible of an exact definition universally applicable. . . . In *Hadley v. State,* 205 Ark. 1027, 172 S.W. 2d 237, 239, the court, among other things, said:

"'The word "Obscene" not being a technical

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conduct is judged by equally vague standards of 'the reasonable man'." 126 F. Supp. at 402.

Times Film Corp. v. Chicago (1956), 139 F. Supp. 837, 841: If "obscene" is held to be too vague, ". . . the State's police power in the area of health and morals, which has always enjoyed constitutional sanction, will be seriously invaded and reduced. . . ." 139 F. Supp. at 841.

State:

People v. Friedrich (1944), 385 Ill. 175, 52 N.E. 2d 120.

State v. Lerner (Ohio Comm. Pl. (1948)), 81 N.E. 2d 282: "The community concept of what is 'obscene' literature is approximately ascertainable." 81 N.E. 2d at 289.

Sunshine Book Co. v. McCaffrey (1952), 112 N.Y.S. 2d 476: "The test of decency is the fair judgment of reasonable adults in the community. The validity of such a test is well recognized in our jurisprudence, and the fact that there are variations depending upon the mores of the community does not destroy it." 112 N.Y.S. 2d at 481.

American Civil Liberties Union v. City of Chicago (1954), 3 Ill. 2d 334, 121 N.E. 2d 585, appeal dismissed 348 U.S. 979, 99 L.Ed. 763, 75 S. Ct. 572 (1955): "We conclude, therefore, that the term 'obscene' has achieved a sufficiently precise meaning to describe a class of films which the State may validly suppress; the subject matter hardly admits of greater definiteness." 121 N.E. 2d at 592.

term of the law, and not being susceptible of exact definition in its judicial or legal use, this question must in any given case be submitted to the jury as a question of fact and the finding of the court, sitting as a jury, in the instant case may not be disturbed if that finding is sustained by testimony sufficient to support that conclusion by an ordinary man of average intelligence.' . . .

"In *Towne v. Eisner,* 245 U.S. 418, 38 Supreme Court, 158, 159, 62 Law Ed. 372, the Supreme Court, speaking through the late Mr. Justice Holmes, said:

" 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' "

Even though the terms obscene, indecent, lewd and terms of similar import have been utilized in laws and statutes ever since the early common law, and in statutes of every State (except New Mexico), and every territory (except Alaska), and by the federal government, and even though the average person can readily recognize examples of obscenity, appellant feels that those terms are too vague for him to understand, stating it can only be defined by "cautological abstractions." Appellant further infers that all such statutes, no matter how worded, would be indefinite, stating:

"We would be less than candid if we denied that we believe that all statutes which seek to regulate 'sexual impurity' in the minds of men, offend the constitution." (App. Br., p. 43.)

On the other hand are the possible consequences arising in the event that the present laws which prohibit and regulate obscenity are declared invalid. It would be difficult, if not impossible, to frame a statute, curbing the type of literature and other objects herein involved, without utilizing the terms obscene, lewd, indecent, salacious or similar terms.

Thus, if appellant is correct in his "candid" belief that all possible statutes seeking to regulate "sexual purity" would offend the Constitution,[26] a decision of this court voiding the present measure hereunder attack would furnish the peddlers of pornography with carte blanche to inundate the nation with their filth.

In *United States v. Patrillo* (1947), 91 L. Ed. 1877, 1882; 332 U.S. 1, 7, this court was faced with a similar contention with reference to a different type of statute and stated:

> "Clearer and more precise language might have been framed by Congress to express what it meant by 'number of employees needed.' But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another

[26] App. Br., p. 43.

to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

"The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson v. United States,* 324 U.S. 282, 285, 286, 89 L.ed. 944, 946, 947, 65 S. Ct. 666. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was willfully attempting to compel another to hire unneeded employees. See *Screws v. United States,* 325 U.S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031, 162 A.L.R. 1330; *United States v. Ragen,* 314 U.S. 513, 522, 524, 525, 86 L. Ed. 383, 389-391, 62 S. Ct. 374. The constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards.

"The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding

and practices. The Constitution requires no more."

C. The Facts of the Instant Case Exemplify a Valid Exercise of the Police Power of the State Which Does Not Encroach On Any Right of Appellant Under the Constitution.

At pages 12 to 14 of the Transcript of Record appears an "analysis of Exhibits," originally prepared for the use of counsel for respondent and, at the request of the Appellate Department of the Superior Court of Los Angeles County, transmitted to that court, for its convenience in analyzing the exhibits. It may be useful to this court for the same purpose.

Respondent respectfully directs the attention of this court to the references under the column headed "Degree of Obscenity and References" and especially to those items characterized, "X Very Obscene."[27] This will avoid embarrassment to the not-too-easily-embarrassed counsel for appellee in dictating to their stenographers, which would result from quoting from exhibits to illustrate their indubitable obscenity.

There is one aspect of the exhibits that we have not found present in any other case we have examined: This is reflected by the symbols "X"[28] and "@" in the Analysis. Those designated "@" are plainly designed

[27]Exhibits 5, (9), 11, 12, 21 and 22. These we consider most obscene. However, we do not mean to imply that there are not many other such items in these exhibits, at other pages, and in other exhibits.

[28]Designated as "Heterosexual" (R. 14), somewhat ineptly selected for lack of an antonym for sado-masochistic. It is not intended to infer that sado-masochistic sexual activity might not, in itself, be either homosexual or heterosexual, as is indeed reflected by exhibits which portray both situations.

and intended to cater to sado-masochistic appetites. A glance at the nature of the activity therein portrayed verifies this statement.

That activity consists of two classes of occurrences. Those between persons of the same sex,[29] and those of different sexes,[30] spanking, beating, hair pulling, whipping and lashing, frequently of women tied to chairs, pillars or other structures, and invariably depicting the women involved, in both the active and passive roles, as scantily clothed, with full and voluptuous figures straining and bursting through ragged garments. Some,[31] less directly sexual, aimed perhaps at a different class of sexual pervert, describe scenes of torture and cruelty in a pseudo-historical fashion, concerning incidents not overtly sexual, but in a gloating, salacious manner, well reflected by the title, "The Pleasures of the Torture Chamber."

There are judicial opinions on the subject of obscenity which discuss the effect of articles of that nature upon hypothetical individuals. This consideration, of course, brings into the picture the wide difference in human beings in manner and degree of response to sexual stimulus; ranging from the repulsion of the frigid to the hair trigger response of the nymphomaniac and the satyromaniac and, as to source, from the most conventional of aphrodisiacs to the obscurely esoteric. Concluding that the vast majority of the

[29]For example, Exhibits 4, "Tina's Torture"; Exhibits 13, 14, 15, and 16.
[30]For example: Exhibits 21 and 22.
[31]Exhibit 9.

population falls well between these extremes, their opinions speak of such effects on the normal individual.

In each instance, however, since the matters under consideration in these cases probably catered only to unperverted, or at least non sado masochistic appetites, it is apparent that the court's use of the word "normal," or the equivalent, is with reference to the degree of response and susceptibility, and not the direction of the sexual response of the hypothetical person affected.

Appellee concludes that these courts did not intend only to include in their definition (and therefore condemn) that which tends to appeal to the non-perverted sexual taste, and exclude (thereby exculpating) that aimed at the sordid exploitation of perversion (as do many of the items of appellant's stock in trade which are in evidence in this case).

It is also apparent from the exhibits that appellant, in preparing his wares, was keenly aware that the distinction is not necessarily sharp between classes of deviation of sexual appetites; that sado masochistic activity is found coexistent with heterosexuality, homosexuality and every degree of so-called bisexuality.

This pandering to the warped, the neurotic, the emotionally disturbed and distorted individual, by the exploitation for profit of the most vicious of human aberrations, seems a far cry from the matters intended by the authors of the First Amendment of the Constitution to be protected as exercises of free speech and a free press.

For freedom of speech "there is no necessity 'to satisfy all tastes, no matter how perverted.' (*Hannegan v. Esquire, Inc.*, supra, 327 U.S. 146, 158.)" (*Brown v. Kingsley Books* (1956), 1 N.Y. 2d 177, 188.)

When considered with some of the other exhibits, which represent the very acme of obscenity in its ordinary sense, this commercialization of perversion, weighed and considered as to its "social value," as the term is used in judging applicability of the First Amendment, seems irreducible.

See also *Chaplinsky v. State of New Hampshire*, supra, 315 U.S. 568, 571-572, 86 L.Ed. 1031, 1035.

In the principle opinion of the consolidated companion case, *United States v. Roth* (1957), 237 Fed. 2d 796, 799, that court might well have been speaking of this aspect of the exhibits in the instant case, when it said:

> "A serious problem does arise when real literature is censored; but in this case no such issue should arise, since the record shows only saleable pornography."

Appellant stresses, as he did in the Appellate Division of the Superior Court (R. 15), that the trial court "found" Exhibit 5 (which includes some of the most obscene matter in the case), not to be obscene. (App. Br., p. 12.)

Appellant's reference to R. 86-88 (as well as a search of the record for any other such comment) in-

dicates that appellant bases his contention on a comment made by the trial court during a discussion prior to his denying appellant's motion to dismiss. At that time, the court stated:

> " . . . They also have reference to 'French love stories, racy, risky—as only the French know how.' So you can see to whom the defendants are appealing in this ad.
>
> "However, getting back to the booklets themselves, as to whether they in themselves are obscene, the court would hesitate in saying so because the books in themselves, I don't believe are obscene, though there is much in these books which in the hands of persons who are desirous of having their lustful passions aroused, they would get a lot of valuable material out of them." (R. 88.)

Assuming that the words, "booklets themselves", refer to Exhibit 5, it must be noted that this statement was made by the court at 12:00 o'clock noon of June 10, 1955, at the end of the prosecution's case, just prior to denying appellant's motion to dismiss (R. 93), and that at that time the court had "not read all of them (the eight booklets composing Exhibit 5) through." (R. 86.)

The court adjudged appellant guilty just before 3:55 p.m. of the same date. (R. 118.)

When a trial without a jury has resulted in a verdict or finding of guilty, all presumptions are in favor of that verdict.

In this situation an appellate court will indulge all reasonable presumptions in favor of the correctness of the judgment or verdict of the trial court (*Pasadena Research Laboratories v. United States*, C.C.A. 9th (1948), 169 F. 2d 375, 380, certiorari denied, 335 U.S. 853, 93 L. Ed. 401; *Zahn v. Hudspeth* (1939), 102 F. 2d 759, 762, certiorari denied 307 U.S. 642, 83 L. Ed. 1522), and will presume that the proceedings had in the progress of the cause, were regular and free from error. (See 24 C.J.S. 707, Criminal Law, Sec. 1849.)

It is well settled in California that remarks by the judge during the course of the trial or even in a formal "opinion", which are inconsistent with the ultimate judgment are not available on appeal to "impeach the finding" (*Nemec v. Polley* (1954), 129 Cal. App. 2d 453, 456) and are "not, strictly speaking, a part of the record," and therefore not available for any purpose. See *People v. Grana* (1934), 1 Cal. 2d 565, 570, wherein the court stated:

> "' . . . It seems clear to us that neither the court's remarks during trial nor his concluding "opinion" can be resorted to on appeal in any way as findings, conclusions of law, instructions or remarks as though to a jury. . . . '"

See[32] also *One, Inc. v. Otto K. Olesen*, supra, No. 15139, ... F. 2d ..... (Ninth Circuit), wherein the Cir-

[32]In Appendix.

cuit Court considered exhibits in addition to those designated by the trial court as obscene.

Therefore, the trial court is presumed to have inspected and read all of the exhibits (as he may well have done subsequent to the remarks quoted, and prior to the time of the judgment) and to have based his judgment on all of the evidence.

Among the booklets constituting Exhibit 5 (which respondent considers among the most obscene of the exhibits), there are nine purporting, superficially, to be of scientific interest. (R. 86.) The advertisement for these same booklets (Exhibit 3 and R. 86, 87), however, asks, "Are ordinary novels too tame for you?", announces, "Banned by Bigots Who Cannot Stand the Meaning of the Word 'Sex.' But available To You If You Hurry," and concludes, "Note: We make every possible effort to prevent these books from reaching young people or persons who would use them for the fulfillment of indecent desires." (R. 87.) Another advertisement, depicting one nude girl running and another lying down, says, "Wild French Cartoons. You'll giggle . . . you'll gasp . . . you'll pop an eyebrow . . . for these are the no-holds-barred French cartoons you've heard so much about." (R. 88.) The trial court commented, "I don't think they would be sending this to a mailing lists of doctors or psychologists who were interested in the subject matter covered by these books from a serious standpoint." (R. 88.)

Judge Learned Hand expressed our contention in this regard, with his usual skill, in *United States v. Rebhuhn* (1940), 109 F. 2d 512, 514, where he states:

> "However, in the case at bar, . . . the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limits; the circulars were no more than appeals to the salaciously disposed, and no sensible jury could have failed to pierce the fragile screen, set up to cover that purpose."

The portion of Exhibit 3, the advertisement, that: "Note: We make every possible effort to prevent these books from reaching young people or persons who would use them for the fulfillment of indecent desires," (R. 87), is a remarkably frank admission of appellant (who caused it to be prepared (R. 105, 106) that his wares have "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires," the standard quoted by the same court of last resort of California (In *People v. Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 961[33]) which affirmed the conviction in the instant case.

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[33]It should be noted that the case was reversed for other reasons, that, therefore, the standard is stated as pure dictum and is not, strictly speaking, an "interpretation" (App. Br., p. 4), a "construing" (App. Br., pp. 22, 23), a "construction" (App. Br., pp. 47, 68); authority for most of appellant's conclusions in his footnote 25 at p. 73 of his brief, or adoption "of the Massachusetts definition" (App. Br., p. 118) as concluded by appellant.

Apropos are the remarks of the court in *United States v. Hornick* (1955), 131 F. Supp. 603, 604:

> "Weighing heavily against the defendants at bar are the two advertising circulars sent in sequence through the mails. This familiar plan capitalizes on a human trait to sample forbidden fruit. The preliminary circular was certainly designed to encourage prospects, including the adolescent and perverted, to purchase 'Sex-sational' pictures. The succeeding circular, accompanying delivery of the first group of pictures (the obscenity of which we doubted), was mailed to 'Our Exclusive Mailing List Customers.' It solicited orders of 'Better' pictures which 'cannot be sent through the mail' and are 'Not Sold to Minors.' In our judgment, this insidious background, which commercializes on sex, panders to the lewd, and tempts the young, taints with obscenity the second group of pictures of naked women delivered by Railway Express."

Nor is the prosecution's case confined to writings. Also included is a colored, three dimensional (stereo), picture which depicts a nude girl, kneeling, with a rubber duck between her legs. Another such picture shows a nude girl kneeling with each of two very large breasts in a correspondingly large champagne glass. Another variation shows another nude girl with two very large breasts hanging over a tennis or fishing net (Exhibit 12, R. 90, 91). The trial court stated, with reference to these three pictures, succinctly, "In my opinion, that is obscene." (R. 91.)

In *One, Inc. v. Otto K. Olesen* (supra), No. 15139 ..... F. 2d .....,[34] the Ninth Circuit Court might have been discussing the exhibits in this case when it said:

> "It is dirty, vulgar and offensive to the moral senses. . . . The magazine under consideration, by reason of the articles referred to, has a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it. Moreover, such articles are morally depraving and debasing. The articles mentioned are sufficient to label the magazine as a whole, obscene and filthy."

Respondent submits that all of the exhibits discussed under this heading, the writings and the pictures, together with those not specifically noted, place this case in a far different category from those where there is the contention, or the possible conclusion, that art, or beauty in picture, statue or writing, are obscene. Such cases have given rise to extended and honest debate which consists, essentially, in comparing the social value of the particular application of freedom of speech and the press, with the damage to society of the matters attempted to be proscribed.

Here, in this case, is nothing of the slightest social value—no art, no beauty, no literature of even the most dubious value, no scientific information of value to students or honest inquirers (and, to give appellant his due, he does not, and has not, at any stage of the case, claimed any of these things for his wares), noth-

[34] See Appendix.

ing but unmitigated filth, affirmatively harmful to morals and conduct, all part of a sordid commercial attempt to make profit of perverted prurience and snide salacity.

Appellee has difficulty in resisting the conclusion that appellant's zeal is based more on an avaricious desire to continue the flow of profits from the pennies of perverts and the dollars of the depraved, than in a crusade for "freedom, especially for art and literature to express themselves unrestrictedly; and freedom for each man in society to be free as an individual to reach social judgments on all matters including standards of morality."[35]

Respondent submits that better examples of a proper exercise of the police power of the state, which in no way encroach upon proper exercise of the freedoms guaranteed by the First Amendment, would be difficult to hypothecate.

D. The California Statute Does Not Impose Prior Restraint or Censorship.

Appellant argues that there is no basic difference between prior restraint, censorship and subsequent punishment in the field of freedom of press and speech, and that therefore the authorities and doctrines with respect to prior restraints or censorship are equally applicable to the facts of the instant case, involving only subsequent punishment. (App. Br., pp. 26-29.)

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[35]App. Br., p. 102.

It is appellee's contention that there is a well recognized distinction between prior restraints and censorship, and subsequent punishment.

Prior restraint pre-supposes a censor. If the censor disapproves of a writing or publication the burden is on the censored party in seeking redress. Under the California statute here involved (Section 311 of the Penal Code), approval is not required before publishing or disseminating words. On the contrary, one may publish or disseminate anything desired, the only limitation arises from the possibility of prosecution if the matter is found to be obscene or in contravention of another criminal statute. The determination of what is obscene or indecedent does not constitute a prior restraint but a decision of a court and jury. The burden is on the prosecution to show that the matter is obscene and the defendant enjoys the presumption of innocence and other judicial safeguards. If appellant, in the instant case, had desired, he had the right to have a jury decide whether the subject matter was in fact obscene. To argue that this judicial process is equivalent to censorship is a distortion of the entire judicial system.

In *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 503, 96 L.Ed. 1098, 1106, passing on the licensing of motion pictures "prior to their being shown," this court stated:

> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punish-

ment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the contents of the words and pictures sought to be communicated. This court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota*, 283 U.S. 697, 75 L.Ed. 1357, 51 S. Ct. 625 (1931). The court there recounted the history which indicates that a major purpose of the First Amendment guarantee of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited.' "

Subsequent punishment gives the wrong doer the choice of doing an act and paying for it, if it is wrong under a criminal statute, or of not doing it. The mere intent to do a criminal act is not a crime, nor is preparation, unless the preparation has reached the proportion of an actual attempt. In this regard, the California statute on obscenity is no different from statutes punishing Burglary, Robbery, Murder or other crimes. It is the act and not the idea that is condemned. Appellant was prohibited from keeping and advertising obscene or indecent literature for sale. The burden was on the prosecution to prove the elements of the crime and appellant had all the judicial protection of a trial. In fact, appellant is invoking such protective procedures by his appeal to this court.

III.

THE FEDERAL POSTAL POWER HAS NO APPLICATION IN THE INSTANT CASE.

The appellant contends that Section 311 of the Penal Code, as applied in the instant case, encroaches on the postal powers of the Federal Government. (App. Br. pp. 108-120.)

The appellant here is not being punished under any federal statute. He has been tried and convicted in a state court, under a state law, having for its object the prevention of keeping for sale or advertising for sale any obscene or indecent book as denounced in Section 311 of the Penal Code.

The state has authority to protect the public morals and welfare of its citizens even from an act also prohibited under federal law. *(People v. Grosofsky* (1946), 73 Cal. App. 2d 15.) The power to pass laws for the restraint and punishment of crime, for the preservation of the health and morals of its citizens, has never been surrendered by the states or restrained by the Constitution of the United States. *(People v. McDannell* (1889), 80 Cal. 285, 291.)

It is immaterial whether the appellant made use of the United States mails to advertise and distribute his obscene wares. As the court of last resort in California stated in its opinion (R. 19, 20):

> "The circumstance that the defendant made use of the United States mails to advertise and to

distribute his obscene wares—and that some of his books were obscene we do not consider debatable—does not render the state statute (section 311) inoperative. (See *In re Phoedovius* (1918), 177 Cal. 238, 246, 170 Pac. 412; *Zinn v. State* (1908), 88 Ark. 273, 114 S.W. 227, 228; *Ex parte Williams* (1940), 345 Mo. 1121, 139 S.W. 2d 485, 491 (which cites *In re Phoedovius, supra;* certiorari denied in U. S. Supreme Court, 311 U.S. 675, 85 L. ed. 434); *Railway Mail Ass'n v. Corsi* (1945), 326 U.S. 88, 95, 89 L. ed. 2072, 2077.)"

Furthermore, the same act may constitute an offense equally against the United States and the State. (*Pettibone v. United States* (1893), 148 U.S. 197, 37 L.Ed. 419; *Cross v. North Carolina* (1889), 132 U.S. 131, 33 L.Ed. 287; *State v. Cioffe* (1943), 130 N.J.L. 160; 32 A. 2d 79; *State v. Moore* (1909), 143 Iowa 240, 121 N.W. 1052; 15 Am. Jur., p. 68.)

In 15 Am. Jur. at p. 68, Section 394, citing many cases, it is stated:

"As a general rule, since the same act may constitute a violation of both federal and state laws, a conviction or acquittal in one jurisdiction will not prevent prosecution in the other."

The instant case is not a contest for jurisdiction over the person between the federal and state courts. (*People v. Branch* (1955), 134 Cal. App. 2d 572, 573.)

We submit that the appellant's contention, that the offenses of which he was charged and convicted, are

subject to exclusive federal jurisdiction and that the state has no power in this area, is without merit.

IV.

ANSWER TO BRIEF FILED BY AMICUS CURIAE

The American Civil Liberties has filed a brief as *Amicus Curiae* on behalf of the appellant in this matter. No new material appears in that brief.

In answer, we adopt the language of the court in *United States v. Two Obscene Books, supra,* 92 F. Supp. 934, 935, wherein it is stated:

> "I am at a loss to perceive what could prompt the representative of the American Civil Liberties Union to urge the court to permit the introduction into this country of books of this kind. 'Civil liberties' and 'freedom of speech' are certainly not synonymous with license and obscenity."

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ONE, INCORPORATED, a corporation, Appellant,	)	No. 15,139
vs.	)	Feb. 27,
OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, Appellee.	)	1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: BARNES and HAMLEY, Circuit Judges, and ROSS, District Judge.

ROSS, District Judge.

The plaintiff, ONE, INCORPORATED, a California corporation, is the publisher of the magazine entitled "ONE", which carries with it the designation, "THE HOMOSEXUAL MAGAZINE", and is published monthly in the City of Los Angeles, California. The defendant, OTTO K. OLESEN, is the POSTMASTER of the City of Los Angeles, California.

Plaintiff delivered to the United States Post Office at Los Angeles, California, for transmission to various

parts of the United States, several hundred copies of the October 1954 issue of "ONE", and was subsequently notified by the defendant that all copies so deposited for mailing were being withheld from dispatch for the reason that he considered the October 1954 issue of "ONE" obscene, lewd, lascivious and filthy, and as such constituted non-mailable matter under the provisions of Section 1461 of Title 18 U.S.C.A., and Section 36.2 of Vol. 29, Code of Federal Regulations (1949). Subsequently, all copies of the magazine were returned by the POSTMASTER to the plaintiff.

Plaintiff then commenced this action seeking a judgment declaring the October 1954 issue of "ONE" lawful and mailable, and an injunction against the POSTMASTER, his agents, servants and employees enjoining them from in any manner failing or refusing to dispatch in the regular course of mail the October 1954 issue of "ONE."

In the trial court, the parties stipulated that the only issue involved was whether the October 1954 issue of "ONE" is non-mailable matter under the provisions of 18 U.S.C.A. 1461, and that such issue should be determined on the motions for summary judgment and the affidavits filed by each of the parties.

The trial court concluded that the POSTMASTER properly refused to transmit the October 1954 issue of "ONE" in the United States mails because it constitutes non-mailable matter under the provisions of 18 U.S.C.A. 1461. From this adverse judgment, plain-

tiff appeals and asserts the following specifications of error:

1. The October 1954 issue of "ONE" is not lewd, lascivious, obscene or filthy, under the standards set forth in 18 U.S.C.A. 1461, and the Findings of Fact set forth in Paragraph VI of the trial court's Findings of Fact, Conclusions of Law and Judgment, are erroneous as a matter of law and fact.

2. That action of the defendant in refusing to transmit said magazine is arbitrary, capricious and an abuse of discretion, unsupported by evidence, deprives plaintiff of equal protection of the laws and constitutes a deprivation of plaintiff's property and liberty without due process of law, and that therefore, the trial court's Conclusions of Law, specifically Paragraph I thereof, are erroneous as a matter of law and fact.

All of the evidence is in writing so we will review the entire evidence, giving due consideration to the findings and conclusions of the trial court. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 395, 68 S. Ct. 525, 92 L.Ed. 746; *Besig v. United States*, 9 Cir. 1953, 208 F2d 142, 144; *Orvis v. Higgins*, 9 Cir. 1950, 180 F2d 537, 539; *Equitable Life Assurance Soc. v. Irelan*, 9 Cir. 1941, 123 F2d 462, 464; Rule 52(a) F.R.C.P. 28 U.S.C.A.

The trial court in Paragraph 6 of its Findings of Fact, referred to by plaintiff in its specifications of error, made the following findings:

1. The story "Sappho Remembered" appearing on pages 12 through 15, is obscene because lustfully stimulating to the homosexual reader.

2. The poem "Lord Samuel and Lord Montagu", appearing on pages 18 and 19, is obscene because of the filthy language used in it.

3. The advertisement for the Swiss publication "The Circle" appearing at the top of page 29, is non-mailable matter because it gives information for the obtaining of obscene matter.

Briefly stated, the specifications of error made by plaintiff, raise but one question, namely: Whether or not the October 1954 issue of "ONE" is non-mailable matter under the provisions of Sec. 1461, Title 18, U.S.C.A.

The pertinent part of Sec. 1461, before the Amendment in 1955, is quoted as follows:

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and . . .
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . ., whether sealed or unsealed; . . . is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. . . ."

Being thus advised we now look into the merits of the appeal. At the outset it is well to dispel any thought that this court is its brothers keeper as to the type of reading to be indulged in. Since the advent of the printing press eminent scholars, including some men of the bench and bar, have uttered and written imperishable words in defenses of the freedom of thought and expression, and the place of a free press in a free world. We need not take issue with this gallant host.

As we view this case we are only concerned with the proper application of a postal regulation, a prosaic and every day matter of the administration of the post office department. Section 1461 amounts to no more than that. Approaching the problem in this workaday manner we find that "ONE" has already suffered two reverses in this connection, the first at the hands of the POSTMASTER, the other by reason of the judgment of the District Court sustaining the POSTMASTER'S ruling. At this point it can be observed that there is no dispute on factual matters.

The District Court found that the ruling of the POSTMASTER was reasonable and supported by the proof—the contents of the magazine. Unless we find that the initial order of the POSTMASTER barring the magazine from the mails was arbitrary, or capricious, or an abuse of discretion, or that there are no reasonable grounds in the record to support the District Court in upholding the POSTMASTER'S order, we are required to sustain.

Our problem here is one of the administration of the post office, and that in turn depends on whether or not the matter sought to be mailed, in this instance the October 1954 issue of the magazine "ONE", is obscene, lewd, lascivious, filthy or indecent. These words can only be defined by some discussion of the moral sense of the public, and it is only to such extent that we are concerned with public morals. In approaching the moral side of the issue here presented we are not unmindful of the fact that morals are not static like the ever lasting hills, but are like the vagrant breezes to which the mariner must ever trim his sails.

The problem here posed cannot, however, be disposed of in a cavalier manner, for we are dealing with intangibles. Our ultimate conclusion as to whether the magazine is mailable or not must be based upon the effect, or impact, that the wording of the various articles in the magazine have upon the reader. There is no precise pattern for reader reaction, so in determining whether the thought patterns created by the words employed in the magazine articles are obscene, lewd, lascivious, filthy or indecent, we must ascertain how other courts met the problem.

Much is now presented to the public, through eye and ear, which would have been offensive a generation ago, but does not today merit a second thought as to propriety. None the less, so long as statutes make use of such words as obscene, lewd, lascivious, filthy and indecent, we are compelled to define such expressions

in the light of today's moral dictionary, even though the definition is at best a shifting one.

The words of the statute, "obscene", "lewd", "lascivious", "filthy" and "indecent", are words of common usage and meaning. In considering the scope and meaning of the words the courts have, through the course of the years, given to such words legal definitions and distinctions, following very closely, if not precisely, the definitions and distinctions found in the recognized standard dictionaries.

Mr. Justice Harlan in delivering the opinion of the court in *Rosen v. United States*, 161 U.S. 29, 43, 16 S. Ct. 434, 40 L. Ed. 606, said, "Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." In that case the court approved the following test of obscenity given in an instruction of the trial court: "The test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall." "Would it suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?"

In *Dunlop v. United States*, 165 U.S. 486, 500, 501, 17 S. Ct. 375, 41 L. Ed. 799, the Supreme Court approved the following instruction:

"Now, what are obscene, lascivious, lewd or indecent publications is largely a question of your own conscience and your own opinion; but it must come —before it can be said of such literature or publication—it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. . . . It is your duty to ascertain in the first place if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

In *Swearingen v. United States,* 161 U.S. 446, 16 S. Ct. 562, 40 L.Ed. 765, the Supreme Court in distinguishing matter which is coarse and vulgar, from obscene, lewd and lascivious matter, held that coarse and vulgar language is not within the meaning of the words obscene, lewd and lascivious. It was said that the words "'obscene", "lewd" and "lascivious", as used in the statute, signify that form of immorality which has relation to sexual impurity, and that it could not perceive of anything in the coarse and vulgar language used in the questioned letter, which was of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.

The Supreme Court in *United States v. Limehouse,* 285 U.S. 424, 52 S. Ct. 412, 76 L. Ed. 843, distinguished filthy matter from obscene, lewd or lascivious matter

in holding that filthy material constituted a new class of non-mailable matter.

The Sixth Circuit in *Tyomies Publishing Co. v. United States,* 211 F. 385, p. 390, defined the word "filthy" as meaning "that which is nasty, dirty, vulgar, indecent, offensive to the moral senses, morally depraving and debasing."

This Court in *Magon v. United States,* 248 F. 201, noted it had been uniformly held in construing the word "obscene", as used in the particular statute, that if the matter were of such nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute.

In *Duncan v. United States,* 48 F2d 128, on page 132, we stated that the test is whether or not the language alleged to be obscene would arouse lewd or lascivious thoughts in the minds of those hearing or reading the publication. The defintion and meaning of the words obscene, lewd and lascivious were again considered by this court in *Burstein v. United States* (1949), 178 F. 2d 665, and in *Besig v. United States* (1953), 208 F2d 142.

Judge Pope, in *Burstein v. United States,* 178 F2 665, 9th Cir., approved the following instruction defining obscene, lewd, or lascivious:

> "Matter is obscene, lewd, or lascivious, within the meaning of the quoted statute, if it is offensive to

> the common sense of decency and modesty of the community, and tends to suggest or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard. The true inquiry in this case is whether or not the publication charged to have been obscene was in fact of that character, and if it was, and the defendant knew its contents at the time he deposited it in the mail, it is not material that he, himself, did not regard it as obscene. . . . The true test to determine whether a writing is nonmailable as obscene, lewd, or lascivious is whether its language has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."

For another definition of the words obscene, lewd, lascivious, filthy and indecent, and an attempted differential, see *Sunshine Book Company v. Summerfield*, 128 FS 564. There the court said:

> "These definitions are the beacons by which the legal channel is lighted for the court . . ."

When the approved definitions and tests are applied to certain articles in the "ONE" magazine, it is apparent that the magazine is obscene and filthy and is therefore non-mailable matter.

Plaintiff, as publisher, states on the second page of the magazine that it is published for the purpose of dealing primarily with homosexuality from the scien-

tific, historical and critical point of view—to sponsor educational programs, lectures and concerts for the aid and benefit of social variants and to promote among the general public an interest, knowledge and understanding of the problems of variation. The story "Sappho Remembered", appearing on pages 12 to 15 of the magazine, the poem "Lord Samuel and Lord Montagu", on pages 18 and 19, and the information given on page 29 as to where to obtain "The Circle", a magazine "with beautiful photos", do not comport with the lofty ideals expressed on page 2 by the publishers.

The article "Sappho Remembered" is the story of a lesbian's influence on a young girl only twenty years of age but "actually nearer sixteen in many essential ways of maturity", in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her room-mate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

The poem "Lord Samuel and Lord Montagu" is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning

to all males to avoid the public toilets while Lord Samuel is "sniffing round the drains" of Piccadilly (London). The poem pertains to sexual matters of such a vulgar and indecent nature that it tends to arouse a feeling of disgust and revulsion. It is dirty, vulgar and offensive to the moral senses. *Swearingen v. United States,* 161 U.S. 446, 16 S. Ct. 562, 40 L. Ed. 765; *United States v. Limehouse,* 285 U. S. 424, 426, 52 S. Ct. 412, 76 L. Ed. 843; *Tyomies Pub. Co. v. United States,* 6 Cir. (1914) 211 F. 385, 390; *United States v. Roth,* 237 F2d 796, 799, 800.

An article may be vulgar, offensive and indecent even though not regarded as such by a particular group of individuals constituting a small segment of the population because their own social or moral standards are far below thoses of the general community. Social standards are fixed by and for the great majority and not by or for a hardened or weakened minority. As this Court said in *Besig v. United States,* 208 F2d 142, p. 145:

> "It is of course true that the ears of some may be so accustomed to words which are ordinarily regarded as obscene that they take no offense at them, but the law is not tempered to the hardened minority of society. The statute forbidding the importation of obscene books is not designed to fit the normal concept of morality of society's dregs, nor of the different concepts of morality throughout the world, nor for all time past and future, but is designed to fit the normal American concept in the age in which we live. It is no legitimate

argument that because there are social groups composed of moral delinquents in this or in other countries, that their language shall be received as legal tender along with the speech of the great masses who trade ideas and information in the honest money of decency."

It is difficult to determine if the article contained on page 29 under the caption "FOREIGN BOOKS AND MAGAZINES. THAT WILL INTEREST YOU", is an advertisement for the magazine "The Circle" or is merely information given by the publisher of "ONE" to its readers as to where to obtain other books and magazines that may be of interest. Regardless, the situation is the same, if information is given as to where, or how, or from whom, or by what means, obscene or filthy material may be obtained. Although on its face the information in this article appears harmless, it cannot be said that the purpose is harmless. It is for the information of those who read the magazine and particularly the homosexuals. It conveys information to the homosexual or any other reader as to where to get more of the material contained in "ONE."

An examination of "The Circle" clearly reveals that it contains obscene and filthy matter which is offensive to the moral senses, morally depraving and debasing, and that it is designed for persons having lecherous and salacious proclivities.

The picture and the sketches are obscene and filthy by prevailing standards. The stories "All This and

Heaven Too", and "Not Til the End", pages 32-36, are similar to the story "Sappho Remembered", except that they relate to the activities of the homosexuals rather than lesbians. Such stories are obscene, lewd and lascivious. They are offensive to the moral senses, morally depraving and debasing. Such literature cannot be classed as historical, scientific and educational for any class of persons. Cheap pornography is a more appropriate classification.

Plaintiff contends that the magazine "ONE" when read as a whole is not obscene or filthy within the meaning of these words. In *Besig v. United States*, supra, we held that the book as a book must be obscene to justify its libel and destruction; but we also held that neither the number of the "objectionable" passages nor the proportion they bear to the whole book are controlling. The magazine under consideration, by reason of the articles referred to, has a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it. Moreover, such articles are morally depraved and debasing. The articles mentioned are sufficient to label the magazine as a whole, obscene and filthy.

In *Parmelee v. United States*, 113 F2d 729, speaking of the "book as a whole" doctrine, the court having before it a related problem, said:

> "Although the word (obscene) has been variously defined, the test in many of the earlier cases was that laid down by Lord Chief Justice in Regina v. Hicklin (3 Q.B. 360, 369, 1868), as follows: '. . .

whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.' And the rule was applied to those portions of the book charged to be obscene rather than to the book as a whole. But more recently this standard has been repudiated, and for it has been substituted the test that a book must be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

The point that the action of the defendant in refusing to transmit the magazine in the United States mails, is arbitrary, capricious, an abuse of discretion and unsupported by the evidence, is without merit. The only argument to sustain this point is that the magazine is not obscene or filthy under the standards set forth in 18 U.S.C.A. 1461. We have decided otherwise.

Plaintiff alsos contends that it has been deprived of the equal protection of the laws. In the trial court, plaintiff stipulated that the only issue involved was whether the October 1954 issue of "ONE" is nonmailable matter under the provisions of 18 U.S.C.A. 1461, and that such issue should be determined on the motions for summary judgment and the affidavits filed by each of the parties. There is nothing in the record to show that plaintiff has been denied the equal protection of the laws. Section 1461 Title 18 U.S.C.A. is applicable to all matter declared by the statute to

be non-mailable, without regard to the character of the persons or class of persons seeking to use the mails for the dissemination of non-mailable matter.

Plaintiff's contention that there has been a denial of due process of law is without merit. Plaintiff commenced this action in the trial court and stipulated that the only issue in the case should be determined by the court on the motions for summary judgment and the affidavits filed by each of the parties. There has been a full and fair trial upon proper notice and the issues presented. It does not appear from the record that plaintiff has been deprived of property or liberty without due process of law.

Based upon our comments and observations heretofore given we hold that the record discloses no prejudicial error and the judgment appealed from is affirmed.

(Endorsed:) Opinion. Filed Feb. 27, 1957.

Paul P. O'Brien, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

Motion for Leave to File Brief Amicus Curiae and Brief.

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IN THE

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No. 61

DAVID S. ALBERTS,

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The American Civil Liberties Union, Southern California Branch, by and through its counsel, respectfully requests permission to appear as *Amicus Curiae*, and file the within brief in support of appellant's appeal in the above entitled matter. *Amicus* herein appeared, with leave of the court below, as *amicus* in the Appellate Department of the Los Angeles Superior Court.

Counsel for petitioner are familiar with the arguments presented by the parties hereto, and believe that there is a need for further argument upon one of the points advanced by appellant.

Petitioner is dedicated to the support and preservation of the civil liberties of all persons, irrespective of status, politics, origin or the nature of the crime charged. Petitioner subscribes to the principle that free speech and opinion are the most vital of our civil liberties, in that these guarantee a dynamic democracy and a responsive

government. But if speech and belief are to serve this function, it is essential that they be left free of restraint, save that minimal amount necessary to preserve ordered liberty.

The statute at bar proscribes obscene literature by punishing those who write, publish and disseminate it. There are approximately forty-six other states, and numerous local committees, with similar legislation. These statutes, however, appear to be bottomed on the notion that sex discussion is somehow unfit to assume its preferred position in our constitutional system. It is the belief of petitioner that this view is inconsistent with the principle that freedom of expression is indivisible; and that the statute at bar is, on its face, and as construed and applied, unconstitutional as a prior restraint on speech, and as unwarranted state action in the absence of an immediate and serious casual relation between the objectionable passages of a book, and the reader's overt response thereto. Because of the national importance of the issues raised by the statute at bar; and because, to petitioner's knowledge, this Court has not previously dealt with the issues at bar; and because of its paramount interest to petitioner, it is respectfully requested that petitioner be granted permission to file the within brief in support of appellant's appeal.

We take no position as to the guilt or innocence of the defendant.

Respectfully submitted,

A. L. WIRIN and
HUGH R. MANES,
Counsel, American Civil Liberties Union,
Southern California Branch.

IN THE

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October Term, 1956

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DAVID S. ALBERTS,

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BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S APPEAL.

ARGUMENT.

The Statute at Bar Presents a Federal Question in That It Proscribes Literature Without Reference to the Overt Behavior of the Reader, and Is Thereby, on Its Face, and as Construed and Applied, Violative of the First and Fourteenth Amendments to the Federal Constitution.

The statute at bar[1] punishes, *inter alia,* the writing, publication and dissemination of any obscene or indecent literature, and "any notice or advertisement" of such material. Appellant was convicted of violating both sections of said statute, and the conviction was sustained on appeal by the Appellate Department of the Los Angeles County Superior Court, that court being in the instant case the court of last resort.

[1]California Penal Code, Section 311, Subdivisions 3 and 4.

It is axiomatic that the democratic process rests upon the free exchange of opinion and expression among all citizens, and that in order to protect the market place of ideas, speech is elevated to a preferred place in our Constitutional system (*Kovacs v. Cooper* (1948), 336 U. S. 77, and cases therein cited in the concurring opinion of Mr. Justice Frankfurter, at pp. 90-95). Moreover, the Fourteenth Amendment enjoins the state from interfering with freedom of speech and press to the same extent that the First Amendment precludes Congress from doing so (*Winters v. New York* (1947), 333 U. S. 507, 509). Freedom of expression and press is not limited, of course, to the espousal of that which is approved by a legislative majority; but the Constitutional protection extends to all speech—even the noxious and the unpopular—save that which constitute a "clear and present danger of action of a kind the state is empowered to prevent and punish" (*West Virginia Board of Education v. Barnette* (1942), 319 U. S. 624, 633, 642). For if opinion have any truth in it, its value is manifest; whereas, if the opinion is false, then it may yet serve as a monument to the wisdom and rationality of that which has been accepted.

This is not to say, however, that only such speech which communicates ideas is prohibited, because, as this Court stated in *Winters v. New York, supra*, at page 510, "The line between the informing and the entertaining is too elusive for the protection of that basic right." And even if the line were ascertainable, common sense would dictate that entertaining speech could not be restricted without endangering opinion of more social value.

The test of permissible speech, therefore, is not whether it contains hated or offensive thoughts, but whether there is time to reply to it (concurring opinion of Mr. Justice

Brandeis in *Whitney v. California* (1926), 274 U. S. 357, 377). Such a test not only acknowledges the validity of the judgment of the governed, but it also concedes the fallibility of the censor.

The statute at bar is one which cannot stand in the light cast by these principles. For one thing, it is not narrowly drawn; is not limited to publications which induce action—lawful or unlawful—but proscribes speech which merely arouses thoughts or ideas. If this is not evident from the face of the provisions at bar, it is certainly so by the construction placed upon it by California courts of last resort, as would appear thusly:

> ". . . A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires'. . . ." (*People v. Wepple* (1947), 78 Cal. App. 2d Supp. 959, 961.)

Government has a legitimate interest in the public health, safety and welfare, and an undoubted power to guard against evils jeopardizing these areas of its concern (*Musser v. Utah* (1947), 333 U. S. 95; *Chaplinsky v. New Hampshire* (1942), 315 U. S. 568). But it has no authority to proscribe literature merely on account of the thoughts—lustful or otherwise—which it may evoke in the reader (*cf. Thornhill v. Alabama* (1940), 310 U. S. 88). In the first place, there is nothing unlawful about such thoughts; secondly, there is no evidence that they will lead to action; and thirdly, if impure thoughts are sufficiently aroused as to incite to action, there is no indication that the resultant conduct will be unlawful.

Plainly, the state can have no legitimate interest in the thinking processes of its citizens (*cf. Thornhill v. Alabama, supra; Hague v. C. I. O.* (1938), 307 U. S.

496; *DeJonge v. Oregon* (1936), 299 U. S. 366). Nor is it enough to burn books; and punish the publishers thereof, because of an alleged *tendency* of such literature to result in undesirable conduct (*Bridges v. California* (1941), 314 U. S. 252, 273). State action in First Amendment areas can be justified only if there is an immediate[2] and serious causal relation between an erotic literary passage and the reader's overt behavior upon reading it. If the evil is said to be that the book incites a breach of the peace, then it is fair to demand that the statute at bar establish this—rather than mere thought—as the indictable offense.

But the vice of obscenity statutes like the one before the Court lies not only in the unconstitutionality of its objectives, but in the error of its assumptions. Here, citizens are deprived of the opportunity of formulating their individual opinions of what literature is suitable for consumption; and yet, are given no assurance that the censor's judgment will be infallible. For ten years, New York readers were deprived of reading James Joyce's "Ulysses," because a state court had ruled it obscene[3]; until finally a federal district court in New York declared otherwise (*United States v. One Book Entitled "Ulysses"* (S. D. N. Y., 1933), 5 Fed. Supp. 182, 72 F. 2d 705).

More importantly, however, is that such legislative interference with individual reading habits occurs at the very market place of ideas: the library and the book shop.

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[2]Even though the imminent danger test has been reduced to probable danger in *Dennis v. United States* (1950), 341 U. S. 494, *Amicus* urges that such modification of the rule should be confined to that area of the law with which that case was concerned.

[3]See:

Commonwealth v. Gordon (1949), 66 D. & C. 101, 114.

And it does so in the absence of evidence that the community—or the individual—is overtly affected by what it reads,[4] or that the time to meet the threat by other means has run out.

The frank implication of obscenity statutes is that community judgment is untrustworthy in such matters. Indeed there is more than mere speculation in this assumption.[5] There is, however, a paucity of evidence to support this paternalism, or even the view that what is read incites to crime. As a matter of fact, at least one "expert" witness argued:

> "But whether the smut points to crime or not, there can be no doubt that it does degenerate taste and debauch the truth."[6]

Even assuming this result, the state can claim no legitimate interest in matters of taste; and hence, its entry in that area is unauthorized.

The statute at bar carries with it also the fallacious assumption that obscenity is so obvious as to obviate analysis; and such was the interpretation placed upon it

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[4]See:

Lockhart and McClure, *Obscenity in the Courts*, 20 Law and Contemporary Problems, 587, at pp. 590-598.

[5]As one expert witness who appeared before the Gathings Committee put it:

> "There are neighborhoods where you will find very many more of the (obscene literature) displayed in cities than in others, *and the unfortunate thing is that (such materials) are usually displayed in neighborhoods which need some moral protection.*" (Emphasis supplied.) (Hearings, Select Committee on Current Pornographic Materials, H. R., 82d Cong., 2d Sess., Dec. 3, 1952, at p. 152.)

[6]*Ibid.*, p. 147: from an article introduced into the record by the witness which appeared in the October, 1952, issue of Readers Digest, by Margaret Culkin Banning.

by the learned court below. But in *Isenstadt v. Commonwealth*,[7] the Massachusetts Supreme Judicial Court, holding Lillian Smith's book, "Strange Fruit," to be obscene, went on to contrast it with George Elliot's "Adam Bede," whose theme, the court observed, "is handled with power and realism without obscenity . . . (and is) universally recognized as an English classic."

Yet, "Adam Bede" was once called "the vile outpourings of a lewd woman's mind."[8]

It would appear, in fact, that some books—the so-called "classics," for example—have acquired an "immunity" from legislative bonfires notwithstanding the obscenity of some of their content.[9] This is attributable either to their age, and/or general public acceptance.[10] But can it be seriously argued that sexual stimulation is somehow precluded by the historic importance of the work, or the artfulness of its prose? Obviously not; and yet, it is unthinkable that the book should be destroyed on that account. On the other hand, the "Canterbury Tales," "De Cameron," "Lady Chatterly's Lover," or "An American Tragedy," cannot be defended by a logic which measures the value of each book by the purity of thought instilled in the mind of its reader. The only test, therefore, which can justify the "classics" is one which leaves that and other literature untouched by emotion or prejudice.

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[7]318 Mass. 543, 556.

[8]See:

Commonwealth v. Gordon, *supra*, p. 116.

[9]See, for example:

United States v. Levine (C. C. A. 2, 1936), 83 F. 2d 156, 157.

[10]Of course, censored books never achieve an acceptance, and so cannot be classified in this category.

The point to be gained from all this is that sex discussion, however written, cannot be treated as a sort of static immorality, likened to crimes of murder, rape and overt lewdness. The difference between shocking words spoken in public, in the presence of a "captive" audience, and shocking words appearing in print, under the eye of a voluntary reader, is a distinction which suffers from too frequent oversight. Speech of the former type is, in effect, conduct uttered by the speaker with notice that its immediate effect will offend the sensibilities of others; whereas, the reader is shocked because he wants to be; or, if accidental, his embarrassment is private, short-lived, and of no great moment. Hence:

> "It cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurement into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience." (*Commonwealth v. Gordon* (1949), 66 D. & C. 101, 153.)

In the last analysis, the legislature has, by virtue of the statute at bar, thrust upon the judiciary the onerous duty of serving as literary critic for the community. There are few judges who care for this responsibility; and even fewer who are equipped with the skill required by that position.

Besides, as Judge Bok so poignantly concludes:

> "The criminal law is not, in my opinion, the '*custos morum* of the King's subjects,' as *Regina v. Hicklin* states: it is only the custodian of the peace and good order that free men and women need for the shaping of their common destiny."[11]

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[11] *Commonwealth v. Gordon, supra*, 66 D. C. 101, 156.

Conclusion.

Amicus respectfully submits that the statute at bar not only poses a federal question, but one of vast importance to the communities having similar laws, and to the freedom of speech involved thereby. The appeal from the decision of the Court below should be granted.

Respectfully submitted,

A. L. WIRIN and
HUGH R. MANES,
Counsel, American Civil Liberties Union, Southern California Branch, Amicus Curiae.

TURN TO

NEXT CARD

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HUGH R. MANES,
Counsel, American Civil Liberties Union, Southern California Branch, Amicus Curiae.

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[10] *Commonwealth v. Gordon, supra*, 66 D. C. 101, 156.

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Brief of American Civil Liberties Union, Southern California Branch, as Amicus Curiae in Support of Appeal.

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PETITION FOR REHEARING.

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The statute at bar proscribes obscene literature by punishing those who write, publish and disseminate it. As construed by California Courts, this statute condemns sex discussion if, in the opinion of the judge or jury, it tends to arouse lasvicious thoughts and lustful desires. The menace of such a law is obvious for it allows a trier of fact to enter the private domain of the conscience in order to purify what is found there. Freedom of speech and press is indivisible; and the State may not delimit that freedom save when the words spoken are a call to action, and there is no time for reply. If a State cannot circumscribe ideas because unpopular or unwise, it cannot reach erotic thoughts either. In the first place, there is nothing unlawful about them, particularly when inchoate, and secondly, governmental interference with

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Commonwealth v. Gordon, 66 D. & D. 101	8
De Jonge v. Oregon, 299 U. S. 353	8, 9
Dennis v. United States, 341 U. S. 494	9
Donaldson v. Reed Magazines, Inc., 333 U. S. 178	12
Herndon v. Lowry, 301 U. S. 242	3
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International Harvester Co. v. Kentucky, 234 U. S. 216	8
Lanzetta v. New Jersey, 306 U. S. 451	8
People v. Wepplo, 78 Cal. App. 2d (Supp.) 956, 178 P. 2d 853	6
Rescue Army v. Municipal Court of the City of Los Angeles, 331 U. S. 549	5
Stromberg v. California, 283 U. S. 359	9
United States v. Alpers, 338 U. S. 680	12
West Virginia State Board of Education v. Barnett, 319 U. S. 624	11
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STATUTES	
California Penal Code, Sec. 311	2, 13
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the communication of ideas cannot depend on their content. Either the State has the power to restrict all ideas, or it is without power to restrict any. *Amicus* adheres to the latter view, and respectfully submits that the broad sweep of obscenity statutes such as that at bar is fatal to their validity. The case at bar is of great national importance, as well as of paramount interest to *amicus*, because it stakes out the furthermost limits of State power in the First Amendment area. Those limits appear not to have been established by this Court heretofore. For these reasons, *amicus* respectfully appears as *amicus curiae* in support of appellant's appeal.

We take no position as to the guilt or innocence of the defendant.

IN THE

Supreme Court of the United States

October Term, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Appellee.

PETITION FOR REHEARING.

David S. Alberts, appellant, presents this petition for a rehearing and in support thereof respectively shows:

I.

Appellant Had Available Substantial Grounds Which the Court Mistakenly Considered Were Not Presented. Constitutional Questions of Great Importance Were Thus Presented and Not Considered or Disposed of by the Court.

A. The Court Mistakenly Stated That No Issue Was Presented Concerning the Obscenity of the Material Involved.

In making the ruling that no issue was presented concerning the obscenity of the material involved, this Court failed to pass upon or rule on appellant's claim that the statute here was unconstitutional as applied to him. Appellant did urge that the statute was unconstitutional on

ARGUMENT.

The Statute at Bar Proscribes Literature Without Reference to the Overt Behavior of the Reader, and Is Thereby, on Its Face, and as Construed and Applied, Violative of the First and Fourteenth Amendments to the Federal Constitution.

The statute at bar[1] punishes, *inter alia*, the writing publication and dissemination of any obscene or indecent literature, and "any notice or advertisement" of such material. Appellant was convicted of violating both sections of said statute, and the conviction was sustained on appeal by the Appellate Department of the Los Angeles County Superior Court, that Court being in the instant case the Court of last resort.

It is axiomatic that the Democratic process rests upon the unencumbered exchange of ideas and opinions among all persons. And the First Amendment is designed to safeguard the channels of communications and all such speech and literature, except that which incites to unlawful action (see: *Chaplinsky v. New Hampshire*, 315 U. S. 568), or obviously offends the sensibilities and rights of others (see: *Kovacs v. Cooper*, 336 U. S. 77). Moreover, the Fourteenth Amendment enjoins the State from obstruction access to the marketplace of ideas to the same extent that the First Amendment precludes Congress from doing so (see: *Winters v. New York*, 333 U. S. 507, 509). Freedom of expression and press is not limited, of course, to the espousal of that which is approved by a legislative majority; but, within the narrow limits aforesaid, the constitutional protection extends to all speech, irrespective of the wisdom or validity of what is said (see: *West*

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[1]California Penal Code, Section 311, Subdivisions 3 and 4.

its face and therefore the Court need not go further, but appellant also urged that the statute, as applied to *the books herein* (the only material passed upon by the Court below) was also invalid.

In its opinion (S. O.[1] 3, fn. 8) the Court said:

> "No issue is presented in either case concerning the obscenity of the material involved."

In this the Court was seriously mistaken. Throughout the proceedings appellant urged that California Penal Code, Section 311, upon its face and as construed *and applied* violated appellant's constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution. The point was raised in the "Questions Presented" in the Jurisdictional Statement (J. S. 4)[2] and in the brief for appellant (App. Br. 7).[3] Unlike appellant in No. 107, appellant here never conceded that his material was obscene.

> "There is, however, no concession here that the writings which resulted in the conviction of appellant were 'obscene and indecent' as defined by the Court below. The appellant continues to assert that all the literature used at the trial against him was protected from governmental interdiction by the provisions of the First and Fourteenth Amendments." (App. Br. 31, fn. 6.)

> "Indeed, the conviction here may well rest upon books clearly protected from governmental abridgement by the Constitution in any view." (App. Br. 71, fn. 24.)

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[1]We thus refer to Slip Opinion.

[2]We thus refer to the Jurisdictional Statement.

[3]We thus refer to Appellant's Brief.

Virginia Board of Education v. Barnette, 319 U. S. 624). For if opinion have any truth in it, its value is manifest; whereas, if the opinion is false, then it may yet serve as a monument to the wisdom and rationality of that which has been accepted.

This is not to say, however, that only such speech which communicates ideas is prohibited, because, as this Court stated in *Winters v. New York, supra*, at page 510, "The line between the informing and the entertaining is too elusive for the protection of that basic right.". And even if the line were ascertainable, common sense would dictate that entertaining speech could not be restricted without endangering opinion of more social value.

The test of permissible speech, therefore, is not whether it contains hated or offensive thoughts, but whether there is time to reply to it (concurring opinion of Mr. Justice Brandeis in *Whitney v. California* (1926), 274 U. S. 357, 377). Such a test not only acknowledges the validity of the judgment of the governed, but it also concedes the fallibility of the censor.

The statute at bar is one which cannot stand in the light cast by these principles. For one thing, it is not narrowly drawn; is not limited to publications which induce action—lawful or unlawful—but proscribes speech which merely arouses thoughts or ideas. If this is not evident from the face of the provisions at bar, it is certainly so by the construction placed upon it by California Courts of last resort, as would appear thusly:

> " . . . A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires'. . . ." (*People v. Wepple* (1947), 78 Cal. App. 2d Supp. 959, 961.)

Finally, virtually all of Point III of appellant's reply brief (App. Rep. Br. 16-20)[1] was devoted to this issue. As we there pointed out, the Appellate Department based its affirmance upon books, and books alone (App. Rep. Br. 17-19). We argued:

> "The matter comes down to about six books which appellee maintains are 'very obscene'. Space does not permit extended comment upon these books, but appellant submits that a reading of each of these writings will indicate (1) that it is simply irrational to urge that anyone should know these books arouse 'lascivious thoughts' in a reader to the extent of corrupting and depraving him; (2) that these books are scientific and literary material protected fully from suppression by the fundamental law; (3) that the ideas contained in these works are important and should be known and considered by those who wish to know and consider them; and (4) that by designating these works as 'pornography' and 'obscenity' the appellee has made crystal clear the vagueness and limitless scope of the statute here involved." (App. Rep. Br. 19.)

If the books which form the basis of appellant's conviction are in truth not obscene, his conviction is contrary to the command of the Fourteenth Amendment. Where, as here, appellant claims that the Act under which he was convicted is unconstitutional on its face, as construed, *and as applied*, it is this Court's duty to "inquire whether the statute as applied in the trial denied appellant rights safeguarded by the Fourteenth Amendment." (*Herndon v. Lowry*, 301 U. S. 242, 247, 254, 259-260.)

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[1] We thus refer to Appellant's Reply Brief.

Government has a legitimate interest in the public health, safety and welfare, and an undoubted power to guard against evils jeopardizing these areas of its concern (*Musser v. Utah* (1947), 333 U. S. 95; *Chaplinsky v. New Hampshire* (1942), 315 U. S. 568). But it has no authority to proscribe literature merely on account of the thoughts—lustful or otherwise—which it may evoke in the reader (*cf. Thornhill v. Alabama* (1940), 310 U. S. 88). In the first place, there is nothing unlawful about such thoughts; secondly, there is no evidence that they will lead to action; and thirdly, if impure thoughts are sufficiently aroused as to incite to action, there is no indication that the resultant conduct will be unlawful.

Plainly, the State can have no legitimate interest in the thinking processes of its citizens (*cf. Thornhill v. Alabama, supra; Hague v. C. I. O.* (1938), 307 U. S. 496; *DeJonge v. Oregon* (1936), 299 U. S. 366). Nor is it enough to burn books and punish the publishers thereof, because of an alleged *tendency* of such literature to result in undesirable conduct (*Bridges v. California* (1941), 314 U. S. 252, 273). State action in First Amendment areas can be justified only if there is an immediate and serious causal relation between an erotic literary passage and the reader's overt behavior upon reading it. If the evil is said to be that the book incites a breach of the peace, then it is fair to demand that the statute at bar establish this—rather than mere thought—as the indictable offense.

But the vice of obscenity statutes like the one before the Court lies not only in the unconstitutionality of its objectives, but in the error of its assumptions. Here, citizens are deprived of the opportunity of formulating their individual opinions of what literature is suitable for

B. The Court Apparently Assumed, Mistakenly, That Appellant Was Not Presenting His Procedural Due Process Point Arising Out of the Failure of the State Court to Specify Which Books Were Obscene and Therefore the Underlying Basis of Appellant's Conviction.

With all due deference to the intimation of Mr. Chief Justice Warren at oral argument that the above point was not before the Court, we submit, respectfully, that the point was presented and urged throughout the proceedings (J. S. 4, 5-8; 23-24; App. Br. 7, 12, 71, fn. 24; App. Rep. Br. 17-19; Further Memorandum Submitted By Leave of Court 43), and appears in fair statement on page 71 of Appellant's Brief:

> "The procedural vice is exemplified in this case. The books were introduced in evidence in groups, and each group given different exhibit numbers. (For a description of the books and their exhibit numbers see Statement of the Case, *supra*.) After ruling out certain exhibits as 'not kept for sale', the trial judge found Exhibits 9 and 11 to be obscene, although 'the court has not read all these books.' [R. 88] Exhibits 1 and 5 were held not obscene [R. 88]. On appeal, appellant argued that Exhibits 9 and 11 had not been proved to be kept for sale. Respondent argued that Exhibit 5, which the trial judge had absolved, should be held obscene by the appellate court and was a sufficient basis for affirmance. The appellate court's only reply was: . . . that some of his books were obscene we do not consider debatable.' [R. 21] Appellant does not know now which 'obscene books led to the affirmance of his conviction, or which books he may sell without

consumption; and yet, are given no assurance that the censor's judgment will be infallible. For ten years, New York readers were deprived of reading James Joyce's "Ulysses," because a state Court had ruled it obscene[2]; until finally a Federal District Court in New York declared otherwise (*United States v. One Book Entitled "Ulysses"*, (S. D. N. Y., 1933), 5 Fed. Supp. 182, 72 F. 2d 705).

More importantly, however, is that such legislative interference with individual reading habits occurs at the very market place of ideas: the library and the book shop. And it does so in the absence of evidence that the community—or the individual—is overtly affected by what it reads,[3] or that the time to meet the threat by other means has run out.

The frank implication of obscenity statutes is that community judgment is untrustworthy in such matters. Indeed there is more than mere speculation in this assumption.[4] There is, however, a paucity of evidence to support this paternalism, or even the view that what is read incites to crime. As a matter of fact, at least one "expert" witness argued:

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[2]See:

Commonwealth v. Gordon (194), 66 D. & C. 101, 114.

[3]See:

Lockhart and McClure, *Obscenity in the Courts*, 20 Law and Contemporary Problems, 587, at pp. 590-598.

[4]As one expert witness who appeared before the Gathings Committee put it:

"There are neighborhoods where you will find very many more of the (obscene literature) displayed in cities than in others, *and the unfortunate thing is that [such materials] are usually displayed in neighborhoods which need some moral protection.*" (Emphasis supplied.) (Hearings, Select Committee on Current Pornographic Materials, H. R., 82d Cong., 2d Sess., Dec. 3, 1952, at p. 152.)

subjecting himself to a second prosecution.[5] (*Cf.*, De Jonge v. Oregon, 299 U. S. 353, 362; Cole v. Arkansas, 333 U. S. 196.) Indeed, the conviction here may well rest upon books clearly protected from governmental abridgement by the Constitution in any view. (*Cf.*, Stromberg v. California, 283 U. S. 359.)"

Finally, if there is any question as to the manner of presentation of the issue appellant respectfully suggests that Rule 58(2) contemplates rehearing in such a situation because of the great public interest in seeing that constitutional questions are correctly decided.

The simple fact is that nobody knows even today after affirmance by this Court which of appellants' books offend the law. As a minimum the case should be returned to the State Court for clarification so that "the underlying constitutional issues" may be presented to this Court "in clean-cut and concrete form." (*Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U. S. 549, 584.)

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[5]As part of the sentence appellant was placed on two years probation, a condition of which was that he should not have in his possession any obscene material. Will he be violating the probation order if he has in his possession "The Picture of Conjugal Love", Exhibit 5, written in the Seventeenth Century? Must *all* of appellant's books be destroyed as obscene pursuant to the trial court's order [R. 5]?

II.

The Standard for Identifying Obscenity Approved by the Court as Meeting Constitutional Objections Is Different From the Standard Under Which Appellant Stands Convicted. Appellant Thus Stands Convicted of a Charge Not Made.

The definition of obscenity approved by the Court as meeting constitutional standards is "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (S. O. 11.) Under California law material is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires." (*People v. Wepplo*, 78 Cal. App. 2d (Supp.) 956, 178 P. 2d 853.)

The Court cited *United States v. One Book Entitled Ulysses*, 72 F. 2d 105 (C. A. 2, 1943), as a case adopting the correct constitutional standard (S. O. 11, fn. 26) but California does "not consent to everything" there said. (*People v. Wepplo*, 78 Cal. App. 2d (Supp.) 956, 178 P. 2d 853, 856.) Nor does California accept "sincerity of purpose" or the opinion of "literary critics". "Literary merit" is also not a criterion. (*People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, 962-963, 178 P. 2d 853.)

Mr. Justice Harlan correctly noted that the Court's definition of obscenity was drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6[6] (Mr. Justice Harlan, S. O. 4). This Tentative Draft

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[6]Hereinafter referred to as Tentative Draft. It is at least of passing interest that this draft was first published May 6, 1957, after argument in this case. The draft was submitted by the Council to the members for discussion at the 34th annual meeting, May 22, 23, 24 and 25, 1957.

rejected the "prevailing test" for determining obscenity, which is the test adopted by California. The Tentative Draft pointed out that in the four following important respects the California test was different from and less satisfactory than the Tentative Draft's "prurient" formula:

1. Because "it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art." (Tentative Draft, 10.)

2. Because "regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." (Tentative Draft, 10.)

3. Because "if actual proof of tendency to corrupt were required, prosecutors would have a difficult task." (Tentative Draft, 10.) Indeed, prosecutors would have an impossible task because, as the Tentative Draft observes, it is virtually impossible to either prove or disprove that books have "a tendency to corrupt". (Tentative Draft, 21, 24, 25-27.)

4. Because it is couched in terms of psychiatric impact on hypothetical persons and "there is no phychiatric concensus, and second, because the legal test must be one reasonably within the power of ordinary citizens to understand, and of policemen and courts to apply." (Tentative Draft, 32.)

In light of the aforesaid we respectfully submit, that in derivation and in logic the two rules are importantly different and the Court erred in equating them.[7]

If then the Court's standard for determining obscenity within constitutional bounds is different from the one under which appellant was tried and convicted appellant was denied due process of law. (*De Jonge v. Oregon*, 299 U. S. 353; *Cole v. Arkansas*, 333 U. S. 196.)

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[7]The suggestion that the California definition of obscenity is the same as the Court's (S. O. 20, footnote 20) can stand only if it be conceded that neither definition is more than a mask and that obscenity is determined not by law but by instinct. (*See Commonwealth v. Gordon*, 66 D & D 101, 116 (Pa. 1949).) Dissenting in No. 107, Mr. Justice Brennan recognized the elusiveness of the new test by stating that in his view a jury was the only competent tribunal capable of separating obscene from constitutionally protected literature. It may be conceded that a jury can "legislate" more satisfactorily in this field than a judge. But when the real issue submitted to a jury is "legislative" not "judicial" a violation of the Fourteenth Amendment occurs. (*Cline v. Frink Dairy Co.*, 274 U. S. 445, 457.) Moreover, if the concept of obscenity is so elusive that a judge may not be trusted to make this determination properly, the standard is not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to criminal penalties. (*Lanzetta v. New Jersey*, 306 U. S. 451.) Mr. Justice Harlan noted that there is no agreement among experts as to what effect, if any, "bad" books have on readers (S. O. 6-7). This "division of opinion" was thought to justify permitting the state to experiment with suppressing books dealing with sex. (Mr. Justice Harlan's opinion, 10-11.) If experts, however cannot determine what effect a book will have on its readers, how can a defendant know? Since the question of obscenity turns upon the book's effect on its readers, how can it be said that the Act gives adequate warning to those subject to its provisions as well as providing proper standards for adjudication? (*International Harvester Co. v. Kentucky*, 234 U. S. 216.) Nor can the vagueness issue be answered by saying that a person, not a book, is on trial. Appellant was not tried or convicted under such an interpretation of the Act [R. 7-8, 98]. If that were the interpretation of the statute it "would raise constitutional questions of a different order" (Mr. Justice Harlan, S. O. 13). Moreover, the intent required by California law is illusory as appears from the brief for the appellant, page 73, fn. 25.

There is another related reason for reversal here. The Court recognizing that "sex and obscenity are not synonymous" (S. O. 9) and the importance of confining the term "obscene" to protect "freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest" (S. O. 11), adopted the American Law Institute's formula which as we have shown was thought to be narrower than the California definition. Under the California test protected books may be found obscene although they could not, it was thought, under the Court's test. Since appellant may have been convicted for distributing constitutionally protected material the rule of *Stromberg v. California*, 283 U. S. 359, requires a reversal.

Finally it should be noted that in giving a different meaning to the state statute without reversing, the Court construed state law by direct action. This the Court may not do. (*Dennis v. United States*, 341 U. S. 494, 501-502.) The Court there observed that it had to reverse cases similar to *Thornhill*, *Herndon* and *De Jonge* because it could not give a state act an interpretation other than the one placed upon it by the state court, even when a narrower construction would save legislation otherwise offensive to the constitution.

III.

The Court's Opinion Does Not Treat or Consider the Serious Constitutional Question of Censorship Under an Unconfined Standard of "Obscenity" Whether Cast as "Tending to Corrupt or Deprave" or "Appealing to Prurient Interest".

The core of the argument presented by appellant to this Court was that the unconfined provisions of the California law vested in the State the arbitrary power to suppress speech. This central thesis was developed at length in the brief and was the fundamental ground for the attack upon the validity of the statute. (See App. Br. 74-107.) This Court has now adopted a new definition for obscenity, to wit: "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (S. O. 11.) It is respectfully submitted that all the arguments that were made in the brief with respect to the California definition apply equally to the standard now enunciated by this Court. As a matter of fact, many of the historical examples to which we referred involved situations in which the attacks on the writings and persons were because of claims of pruriency. Mr. Justice Brennan dissenting in No. 107 himself recognized the essential vagueness of the new standard. His dissent as we have shown is bottomed on the premise that the new definition of obscenity was so elusive that a judge could not be trusted to separate obscene literature from constitutionally protected literature. In his view a jury was the only competent tribunal to make this determination. Perhaps a jury can censor "obscene" material more in keeping with the mood of the community than a judge but historically a great deal of

the censorship which is condemned by the First Amendment was often done with greatest popular support.

This Court in *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870 unanimously held the standard "obscene" to be an unconstitutional one creating censorship of speech. Can it be suggested now that the vice there recognized could be cured by the mere addition on the part of the State censoring board of a finding of "pruriency"?

We respectfully submit that the varying views of the Justices as expressed in the opinions deal with some of the symptoms of censorship without actually discussing or passing upon the constitutional vice of censorship itself. For example, Mr. Justice Harlan noted in his concurring and dissenting opinion:

> ". . . this statute as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech."

That is true of this case also. If "Lady Chatterley's Lover" is protected by the First Amendment against federal censorship it is equally protected by the Fourteenth Amendment against state suppression (*Winters v. New York*, 333 U. S. 507, 508) by "village tyrants." (*West Virginia State Board of Education v. Barnett*, 319 U. S. 624, 638.) It is no answer to say that no "overwhelming danger . . . is likely to result from the suppression of a borderline book in one of the states . . ." (Mr. Justice Harlan, S. O. 11.) This Court has always been vigilant to prevent the first small breach of the Constitution since the erosion of vital rights *always* commences with small "borderline" invasions.

In No. 107 Mr. Chief Justice Warren, dissenting said:

> "There is totally lacking any standard in the statute for judging the book in context . . . certainly in the absence of a prior judicial determination of illegal use, books, pictures and other objects of expression should not be destroyed. It savors too much of book burning."

In No. 107 Mr. Justice Frankfurter observes that "in its effective operation" there is more, not less, censorship here than in No. 107. (Mr. Justice Frankfurter, S. O. 6.)

On another occasion Mr. Justice Frankfurter joined the dissent in *United States v. Alpers*, 338 U. S. 680, where it was stated:

> "Censorship in any field [including 'publications or pictures found to be indecent, obscene, etc.] may . . . readily encroach on constitutionally protected liberties . . ." (P. 687.)

Again, Mr. Justice Burton showed an awareness of the threat of censorship, dissenting in *Donaldson v. Reed Magazines, Inc.*, 333 U. S. 178, 192.

Appellant respectfully submits that the important and significant constitutional question here presented should be passed on by this Court. Censorship in any form and under any guise, whether exercised by governmental bodies or by dominant majorities in the community sitting as a jury is a vice which the First Amendment forbids and which a democratic society cannot endure. It would be regrettable if a constitutional question of such broad scope, properly presented to this Court in a proceeding, should not be considered and determined by the

final tribunal of the land. The stifling effect of censorship is self-perpetuating, which partly explains the length of time it took to finally bring this issue before the Court. It is difficult to exaggerate the far reaching consequences to society if the Court fails to grapple with this crucial censorship question. Rather than face prosecution in a tribunal where the jury makes the law as it renders its verdict the hapless book dealer and book seller will discard what is constitutionally protected writings, art and literature, and avoid further litigation; yet at the same time society will be suffering from this censorship imposed under the standard of "pruriency". A matter of such societal consequence should not be passed *sub silento*.

Conclusion.

Rehearing should be granted and the judgment reversed. In the alternative, the case should be returned to the State Court for a specific determination of the material found to be obscene and for the State Court's interpretation of California Penal Code, Section 311, in the light of the Court's opinion.

Respectfully submitted,

STANLEY FLEISHMAN,

Attorney for Appellant.

WILLIAM B. MURRISH,

SAM ROSENWEIN,

Of Counsel.

Attorney's Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for appellant, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,

Attorney for Appellant.